ONLINE PLATFORMS AND MARKET POWER, PART 4: PERSPECTIVES OF THE ANTITRUST AGENCIES

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

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ONLINE PLATFORMS AND MARKET POWER, PART 4: PERSPECTIVES OF THE ANTITRUST AGENCIES

WEDNESDAY, NOVEMBER 13, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 2:07 p.m., in Room 2141, Rayburn House Office Building, Hon. David Cicilline [chairman of the subcommittee] presiding.

Present: Representatives Cicilline, Nadler, Neguse, Johnson, Jayapal, Scanlon, McBath, Sensenbrenner, Collins, Armstrong, and Steube.

Also Present: Representative Cline.

Staff Present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Amanda Lewis, Counsel, Antitrust, Commercial and Administrative Law; Joseph Van Wye, Professional Staff Member, Antitrust, Commercial and Administrative Law; Lina Khan, Counsel, Antitrust, Commercial and Administrative Law; Slade Bond, Chief Counsel, Antitrust, Commercial and Administrative Law; Daniel Flores, Minority Chief Counsel; and Andrea Woodard, Minority Professional Staff.

Mr. CICILLINE. The subcommittee will come to order. Without objection, the chair is authorized to declare recesses at any time.

We welcome everyone to the fourth in a series of hearings investigating competition in digital markets, this one focusing on the perspectives of the antitrust agencies. I now recognize myself for an opening statement.

We are living through a moment of extreme concentration across our economy. In industry after industry, just a few companies dominate critical markets that affect the day-to-day lives of hard-working Americans. Unchecked by competition, dominant corporations can abuse their market power to raise prices for consumers, lower wages, and stifle entrepreneurship and small businesses, enriching their executives and shareholders at the expense of everyone else.

One area where this extreme concentration is most troubling is in the digital economy, where a small number of dominant plat-

forms have become critical intermediaries for the flow of commerce and information. While these platforms have delivered American consumers some benefits, there's growing evidence that these platforms are now using their power to set the terms of the market in ways that enrich them but make it impossible to compete on an even playing field.

Each day, the news is full of reports documenting how decisions by this handful of corporations increasingly determine whether a merchant, app developer, or news publisher sinks or swims.

Because several of these digital monopolies operate business models premised on the surveillance of Americans, the power they wield over us is by many measures unprecedented. Six months ago, this committee initiated a bipartisan investigation into competition issues in digital markets. This investigation follows a long tradition of congressional investigations into monopoly power, including industry-wide assessments of whether dominant corporations are abusing their market power, whether our laws are working, and how to reverse the rising tide of economic concentration.

This investigation is pursuing a similar path, and a key task for the subcommittee is understanding the enforcement record of the antitrust agencies. Over the past decade, the largest technology firms have acquired over 436 companies, many of which were actual or potential competitors, according to a New York Times report by Tim Wu and Stuart Thompson, but not a single one of these acquisitions was challenged by antitrust enforcers. In fact, only a handful of these were closely scrutinized. The last major monopolization case brought by Federal enforcers was Microsoft 20 years ago.

While these problems have plagued enforcement across markets and not just in the digital economy, the enforcement gap in these markets has created a de facto antitrust exemption for online platforms. Have the agencies failed to bring cases because of unfavorable case law, requiring congressional action to amend the law? Is this inaction due to a lack of agency resources, or is it due to a lack of will at the agencies to enforce the laws on the books?

These are the questions that the subcommittee is looking to answer through its investigation in areas that I hope will be fully addressed during today's hearing.

In closing, I want to thank Chairman Simons and Assistant Attorney General Delrahim for their appearance today and look forward to hearing their testimony.

And I now recognize the very distinguished gentleman from Wisconsin, Ranking Member Sensenbrenner, for his opening statement.

Mr. SENSENBRENNER. Well, thank you very much, Mr. Chairman.

I want to welcome Mr. Delrahim and Mr. Simons to our hearing today.

In the ordinary course of oversight of the antitrust enforcement agencies we conduct annual or biannual oversight hearings to examine the waterfront of issues before these important agencies. But today Assistant Attorney General Delrahim and Chairman Simons have graciously appeared to discuss only one set of issues before us, antitrust issues concerning the tech sector.

Like members of this subcommittee, these key government officials recognize the importance of making sure that we get right the applicability of this Nation's antitrust laws for this critical sector of our modern economy. And like us, each of them is in the midst of a searching inquiry into whether our century-old antitrust laws and our government's enforcement of those laws is adequate for the challenges presented by our new digital economy.

In our inquiry in the subcommittee, we have thus far looked at whether entities in the tech sector, particularly the largest online platforms, have or have not been accumulating and leveraging market power over competitors and other market participants. Affected entities include fellow tech innovators, news publishers, and app developers who depend upon large online platforms to reach consumers and many others.

We have also examined aspects of online data privacy and the role that online data plays in competition, particularly with very large accumulations of consumers' online data.

Today we gather to hear the perspectives of the two antitrust enforcement agencies on these and other tech issues. This will help us not only to engage in oversight of these agencies' activities in the tech sector but also to reap the benefit of those agencies' expertise and wisdom as we assess whether or not our antitrust laws and agencies are up to the task or instead need amendment or added resources.

While this hearing is narrowly focused, it should be noted that there are a number of issues before the Department of Justice that Members of Congress are monitoring closely. This includes the review of consent decrees, and it is my intention to submit questions for the record on this topic.

I encourage our witnesses and all of us to recognize that Congress and the antitrust enforcement agencies need to be careful not to overreach to extend or apply the antitrust laws in ways that end up punishing success, suppressing innovation, and ultimately limiting consumer welfare.

I thank the witnesses for coming and yield back.

Mr. CICILLINE. I thank the gentleman, the ranking member, for yielding back.

I now recognize the chairman of the full committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chairman NADLER. Thank you, Mr. Chairman, for convening today's oversight hearing of the antitrust agencies and our competition system.

As part 4 of our series of hearings on online platforms and market power, today's discussion is essential to advancing the committee's bipartisan investigation into competition in digital markets.

This hearing occurs at a critical moment. There is growing evidence that a handful of dominant platforms now control key arteries of online commerce, content, and communications. A number of important digital markets are now dominated by just one or two firms.

For example, Google controls over 90 percent of the global search market, and Facebook captures over 80 percent of all global social media revenues. By some estimates, Amazon controls about half of all online commerce in the United States.

While the open internet has delivered enormous benefits to Americans, waves of anticompetitive consolidation in digital markets have had devastating effects on key elements of our democracy and economy, such as a free and diverse press. It also threatens the survival of a key element of our economy, the American start-up. Empirical evidence suggests that the trends of increasing consolidation of market power in digital markets pose a threat to technology startups and to innovation in the U.S. economy.

For example, it has been reported that seed funding for technology startups, the initial round of investment in a startup, has declined significantly just from 2015 to 2018.

I am deeply concerned about the antitrust agencies' lax merger enforcement, which has permitted these harmful levels of concentration and the rise of market power in the digital economy.

In addition to rising consolidation, there have also been allegations of anticompetitive conduct in digital markets. For instance, as more small and medium-sized businesses become reliant on the dominant platforms to reach consumers, they have increasing concerns that discriminatory or exclusionary conduct by the platforms could destroy their business over the course of just a few days or months.

Despite mounting evidence of illegal monopolization activities by some of the dominant platforms and numerous cases brought by international enforcers, U.S. enforcers appear to be paralyzed. It has been decades, decades, since the Department of Justice or the Federal Trade Commission has brought a significant monopolization case in the tech sector. This is not just a criticism of the current administration. It has been decades since a significant monopolization case has been brought in the tech sector.

Tim Wu, a professor at Columbia University, testified before the Judiciary Committee in July that the Department of Justice court challenges against AT&T, IBM, and Microsoft, quote, "were foundational in terms of shaking up industry and creating room for new firms to grow," unquote.

I am encouraged by reports of the agencies' current investigations into the dominant tech platforms, but the decline in enforcement over the past several decades is extremely troubling—a decline, I should add, that has occurred across all industries, not just in the technology sector. I find it hard to believe that companies in all sectors have simply ceased engaging in illegal monopolization rather than the more likely explanation, which is that the agencies have been and are underenforcing the antitrust laws.

There may be a number of reasons for underenforcement by the agencies with respect to both anticompetitive conduct and to merger review, including unfavorable case law, insufficient enforcement will, and inadequate agency resources, all of which I look forward to having examined at today's hearing.

One problem Congress can most directly address is ensuring that the agencies charged with antitrust enforcement have sufficient funding. Unfortunately, appropriations of these agencies have declined over the last decade in spite of the increase in merger activity and an increase in the complexity of investigations. In real terms, agency funding in 2019, this year, was nearly 20 percent lower than in 2010.

It is vital that the antitrust agencies have the resources they need to do their jobs. I doubt that the gentlemen in front of me will disagree with that statement, at least.

While ultimately it is the responsibility of the antitrust enforcement agencies to enforce the law, Congress has an obligation to assess whether existing antitrust laws and competition policies and the will to enforce those laws and policies are adequate to address the competition issues facing our country and to take action if they are found to be lacking.

Over the past 6 months, the committee's bipartisan investigation into competition in the online marketplace has explored these questions in the context of digital markets. It is essential that we continue this important work through today's hearing and throughout this Congress as we seek to address competition problems in digital markets for the benefit of American consumers, small businesses, and workers.

With that, I look forward to hearing from our witnesses today, and I thank them for their participation.

I yield back.

Mr. CICILLINE. I thank the gentleman for yielding back.

It's now my pleasure to introduce today's witnesses.

Our first witness, Joseph Simons, was sworn in as Chairman of the Federal Trade Commission in 2018. Prior to joining the Commission, Chairman Simons was a partner at Paul, Weiss, Rifkind, Wharton & Garrison and co-chair of their Antitrust Group. He's held multiple positions at the FTC throughout his career, including assistant director for evaluation, associate director for mergers, and director of the Bureau of Competition.

Chairman Simons received his A.B. from Cornell University and his J.D. from Georgetown University Law Center, a fine, fine institution.

Our second witness is Makan Delrahim, assistant attorney general for the Antitrust Division of the United States Department of Justice. Prior to his confirmation in 2017, Mr. Delrahim assisted President Trump's transition team and was briefly deputy White House counsel. He previously served in the DOJ's Antitrust Division in 2003 as deputy assistant attorney general under President George W. Bush. Before his time in the executive branch, Mr. Delrahim was chief of staff and chief counsel to the Senate Judiciary Committee under Chairman Orrin Hatch.

Mr. Delrahim received his B.S. from the University of California, Los Angeles and his J.D. from the George Washington University School of Law.

We welcome our distinguished witnesses and thank them for participating in today's hearing.

And now, if you would please rise, I will begin by swearing you in.

Please raise your right hands. Do you swear or affirm under penalty of perjury that the testimony you're about to give is true and correct, to the best of your knowledge, information, and belief, so help you God?

You may be seated.

Let the record show the witnesses answered in the affirmative.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there's a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals that your 5 minutes have expired.

Chairman Simons, you may begin.

TESTIMONY OF THE HONORABLE JOSEPH SIMONS, CHAIRMAN, FEDERAL TRADE COMMISSION; AND THE HONORABLE MAKAN DELRAHIM, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

TESTIMONY OF JOSEPH SIMONS

Mr. SIMONS. Chairman Cicilline, Ranking Member Sensenbrenner, and members of the subcommittee, thank you for the opportunity to appear before you today. I am pleased to talk about the Commission's current competition enforcement activities and policy priorities, particularly with regard to digital platforms. I'm also very happy to appear alongside my esteemed colleague, Assistant Attorney General Makan Delrahim.

Please know that the written statement that I submitted is on behalf of the Commission. My oral statement and responses to your questions today are my own and do not necessarily represent the views of the Commission or any individual commissioner, other than me.

First, I want to thank the committee for its work in areas that are core to our mission, such as pay for delay settlements and drug companies' abuse of the regulatory processes to thwart competition. I also very much appreciate your support in addressing recent court challenges to our 13(b) authority, which is critical.

Today, I want to briefly highlight the recent FTC competition enforcement matters and developments at the agency. In particular, the agency has taken notable actions to prevent anticompetitive mergers and conduct, including in digital markets, that are of interest to this committee and others.

Over the past 2 years, the Commission has had 43 merger enforcement actions, including seven in litigation for which we are undefeated. These cases have implications across the U.S. economy in markets for specialized software, medical devices, industrial chemicals, and familiar consumer staples.

With respect to conduct, the FTC recently voted unanimously to bring a monopolization case involving vertical restraints on a digital platform. The FTC's complaint against Surescripts alleges that Surescripts is a monopolist in two multisided platforms, one connecting doctors to pharmacies and one connecting doctors to PBMs. The complaint alleges that Surescripts used exclusive contracts and similar arrangements to protect its dominant positions in both markets.

In another matter, last year the Commission ruled that 1–800 Contacts had unlawfully entered into agreements with rivals to restrict the scope of truthful, nondeceptive online advertising. As the Commission learned through its earlier research program on adver-

tising restrictions, agreements among competitors to restrict otherwise lawful advertising often reduces competition. The FTC continues to monitor closely the behavior of participants in similar markets.

In an effort to deepen our focus on technology markets and make it a real emphasis, our Bureau of Competition shifted internal resources earlier this year to establish a Technology Enforcement Division. This dedicated group is investigating competition in U.S. technology markets and will recommend enforcement action where warranted.

For example, as Facebook recently publicized, our Technology Enforcement Division has commenced an antitrust investigation into some of Facebook's business practices.

Finally, we continue our robust policy work, including hearings on Competition and Consumer Protection in the 21st Century. We held quite a number of hearings focused on various parts of the technology sector, such as multisided platforms, algorithms, artificial intelligence, and data security. We expect to begin releasing output soon, including technology platform guidance.

We are committed to using our resources efficiently to protect consumers and to promote competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges.

Thank you for your time, and I look forward to your questions.

[The statement of Mr. Simons follows:]

Prepared Statement of
the Federal Trade Commission

Before the
Subcommittee on Antitrust, Commercial and Administrative Law
Of the Judiciary Committee
United States House of Representatives

"Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies"

Washington, D.C.
November 13, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Joe Simons, Chairman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission regarding some of our current competition enforcement activities and policy priorities.[1]

For over 100 years, the FTC has worked to ensure that our nation's markets are open, vibrant, and working for American consumers. We accomplish these goals through targeted yet vigorous enforcement of the nation's antitrust and consumer protection laws, and by using our unique set of research and policy tools. Though the U.S. economy is always evolving, the FTC's structure, research capacity, and committed staff enable us to protect consumers and promote competition in an ever-changing marketplace. This testimony highlights a number of recent FTC competition enforcement matters, with notable victories in stopping anticompetitive mergers and conduct—including in digital markets that are of interest to this Committee and others. We also provide an update on some of our more significant policy initiatives, and briefly highlight some of our advocacy work, both here and abroad.

I. FTC Competition Enforcement

The Commission promotes competition through a rigorous, fact-intensive approach to law enforcement. The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts on sectors that most directly affect consumers and their wallets, such as health care, pharmaceuticals, consumer products and services, technology, manufacturing, and energy. The FTC shares primary jurisdiction with the U.S. Department of Justice's Antitrust Division ("DOJ") (collectively, "the agencies") in enforcing the nation's antitrust laws.

[1] This written statement represents the views of the Federal Trade Commission. The oral presentation and responses to questions by Chairman Simons are his own, and do not necessarily reflect the views of the Commission or of any other Commissioner.

A. Maintaining Competition through Robust Merger Enforcement

One of the agencies' principal responsibilities is to prevent mergers that may substantially lessen competition. Under the Hart-Scott-Rodino ("HSR") Act, parties to certain mergers and acquisitions must notify the FTC and DOJ of their intent to merge, and must observe a statutory waiting period before consummating their transactions. In general, since FY 2013, these premerger filings have increased steadily; last year, for the second year in a row, we received just over 2,000 HSR filings.[2]

Most reported transactions do not raise significant competition concerns, and the agencies clear non-problematic transactions expeditiously. But when the evidence suggests that a proposed transaction is likely to harm competition, the Commission does not hesitate to intervene. In FY 2019, the FTC challenged 21 mergers. Most of these matters were resolved with the parties through consent decrees that preserved pre-merger levels of competition.

Over the past two years, the Commission has challenged seven mergers in court, and the agency's litigation staff compiled an impressive record of success so far. Of the five challenges that occurred in FY 2018, federal courts granted preliminary injunctions in two cases;[3] the parties abandoned their mergers in the face of our court challenge in two other cases;[4] and the

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[2] The agencies received 2,100 HSR filings in FY 2018, a slight increase from FY 2017, where we received 2,052. Apart from these two years, the last time HSR filings exceeded 2,000 was in FY 2007.

[3] *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018) (granting preliminary injunction); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27 (D.D.C. 2018) (granting preliminary injunction). The agency also won a full administrative trial on the merits in the *Tronox* matter before an administrative law judge, before the parties ultimately settled with the agency. FTC Press Release, *FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger* (Apr. 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-requires-divestitures-tronox-cristal-suppliers-widely-used.

[4] J.M. Smucker Co. abandoned its planned acquisition of Conagra's Wesson cooking oil brand after the FTC filed suit in March 2018. FTC Press Release, *FTC Challenges Proposed Acquisition of Conagra's Wesson Cooking Oil Brand by Crisco Owner, J.M. Smucker Co.* (Mar. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil. CDK abandoned its plans to purchase rival software vendor Auto/Mate after the Commission initiated litigation in March 2018. *In re CDK Global & Auto/Mate*, Dkt. 9382 (Mar. 20, 2018), https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

Commission recently issued an opinion upholding an administrative law judge's initial decision finding liability in the fifth matter.[5] These cases raised competition issues all across the U.S. economy, implicating markets for specialized software, medical devices, industrial chemicals, and familiar consumer staples.

FY 2019 was no different, with the Commission continuing to initiate litigation when necessary to prevent anticompetitive harm. For instance, the Commission filed a motion for a preliminary injunction to block Evonik Industries AG's proposed $625 million acquisition of PeroxyChem Holding company.[6] The complaint alleges that the merger of the chemical companies would substantially reduce competition in both the Pacific Northwest and the Southern and Central United States for the production and sale of hydrogen peroxide, a commodity chemical that has a variety of end uses including bleaching pulp, de-inking recycled paper, and sterilizing food and beverage packaging. The FTC has asked the federal district court to enjoin the merger pending the outcome of an administrative trial, which is scheduled to begin January 22, 2020.

In September, the Commission issued an administrative complaint to block a merger between two of the "Big 4" largest title insurance underwriters in the nation, in order to preserve the beneficial competition that plays out in everyday real estate transactions across the United States. The complaint alleged that Fidelity National Financial, Inc.'s proposed $1.2 billion acquisition of Stewart Information Services would substantially lessen competition in state markets for title insurance underwriting for large commercial transactions, and in several local

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[5] In December 2017, the FTC challenged the consummated merger of two manufacturers of prosthetic knees controlled by microprocessors. On November 1, 2019, after a full administrative trial, the Commission upheld the administrative complaint challenging the merger and ordered a divestiture of the acquired business. *In re Otto Bock HealthCare North America, Inc.*, Dkt. 9378, Comm'n Op. (Nov. 6, 2019), https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf.

[6] FTC Press Release, *FTC Challenges Proposed Merger of Two Hydrogen Peroxide Producers* (Aug. 2, 2019), https://www.ftc.gov/news-events/press-releases/2019/08/ftc-challenges-proposed-merger-two-hydrogen-peroxide-producers.

markets for title information services.[7] Although the Commission has required the divestiture of title plant assets in prior mergers involving Fidelity,[8] for the first time the Commission also alleged that the elimination of competition would likely harm customers seeking to purchase title insurance for large commercial transactions. The Commission authorized staff if necessary to seek preliminary relief to prevent the merger pending an administrative trial, which was scheduled to begin in February 2020. The parties abandoned the transaction after the Commission issued its complaint.[9]

One increasing challenge for the Commission in litigating competition cases is the need to hire testifying economic experts. Vigorous enforcement requires the right tools, and qualified experts are a critical resource in every FTC competition case where litigation appears likely. Over the last five years, our annual expert costs for competition matters have risen significantly. In FY 2014, the agency spent just $4.84 million on expert fees in competition cases. In FY 2018, we spent $15.84 million. For a small agency like the FTC, cost changes of this magnitude are challenging to absorb.

We are taking steps to manage these increasing expenses more aggressively, but long-term, structural changes in the economy likely mean that the cost of expert work will continue to grow.[10] Although the FTC has so far managed to allocate sufficient resources to fund the experts needed to support our cases, the agency is reaching the point where we will be unable to meet

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[7] *In re Fidelity National Financial, Inc.*, Dkt. 9385 (Sept. 6, 2019), https://www.ftc.gov/enforcement/cases-proceedings/181-0127/fidelity-national-financialstewart-information-services.

[8] *See, e.g., In re Fidelity National Financial, Inc.*, Dkt. C-4425 (Dec. 24, 2013), https://www.ftc.gov/enforcement/cases-proceedings/131-0159/fidelity-national-financial-inc-lender-processing-services.

[9] FTC Press Release, *Statement of Bruce Hoffman, Director of FTC's Bureau of Competition, on Fidelity National Financial, Inc.'s Decision to Drop Proposed Acquisition of Stewart Information Services Corporation* (Sept. 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/statement-bruce-hoffman-director-ftcs-bureau-competition-fidelity.

[10] Today, companies can create and store vast amounts of data about their operations. These richer datasets may enable our testifying experts to conduct higher quality empirical work, but their complexity also requires more review and analysis, and therefore much more time and effort by our experts and their support staff.

these needs without compromising our ability to fulfill other aspects of the mission. The Commission appreciates Congress's attention to our resource needs, including the need to continue to hire qualified outside experts to support effective antitrust enforcement.

B. Combatting Anticompetitive Conduct in Pharmaceutical Markets

The FTC maintains a robust program to identify and stop anticompetitive conduct, especially in the nation's critical markets for health care. We appreciate the bipartisan work of this Committee to enable the Commission to address conduct more effectively by drug companies that limits competition and keeps drug prices high.

For over 20 years, and on a bipartisan basis, the Commission has prioritized ending anticompetitive "reverse payment" agreements in pharmaceutical markets.[11] These agreements involve the branded drug supplier paying a generic firm to abandon its patent challenge and agree not to sell its lower-cost generic product for a period of time. The payment allows the branded company to ensure a period in which it can maintain higher market prices—increasing U.S. health care costs—without the threat of generic competition.

In 2013, the Commission won a critical victory in *FTC v. Actavis*[12] when the U.S. Supreme Court clarified that pay-for-delay arrangements can violate the antitrust laws. This year brought another important milestone in the Commission's long-running effort to combat anticompetitive reverse payment settlements: on the eve of trial, the defendants agreed to settle the original case that led to the Supreme Court's landmark *Actavis* decision. Although we are delighted with the progress on the reverse payment front, we recognize that the economic incentives to engage in this conduct remain in place today, necessitating continued antitrust

[11] *See generally* Fed. Trade Comm'n, Pay for Delay: When Drug Companies Agree Not to Compete, https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay (gathering materials related to the history of the FTC's efforts on this issue).
[12] *FTC v. Actavis*, 570 U.S. 756 (2013).

enforcement. For example, in March of this year, the Commission unanimously held that Impax Laboratories and Endo Pharmaceuticals had entered into a reverse payment arrangement that delayed generic entry of Opana ER, an extended release opioid used for pain relief.[13]

At the time of the *Actavis* decision, critics of our enforcement work warned that using antitrust enforcement to stop reverse payment arrangements would have dire consequences; they cautioned that settlement of pharmaceutical patent disputes would become difficult or impossible, and eventually would reduce generic firms' investment in new products. But post-*Actavis* data tell a different story.[14] The agency's sustained attack on reverse payment arrangements has not chilled patent litigation settlements under the Hatch-Waxman Act. Rather, the number of pharmaceutical patent litigation settlements reported to the FTC has actually *increased* dramatically since *Actavis* was decided.[15] What has changed is that pharmaceutical companies use far fewer anticompetitive reverse payments in their patent litigation settlements. Back in FY 2006-2007, just under half of all reported settlements included some form of reverse payment provision.[16] In FY 2016, that number fell to just one settlement out of 232 reported.[17] In

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[13] FTC Press Release, *FTC Concludes that Impax Entered Into Illegal Pay-for-Delay Agreement* (March 25, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-concludes-impax-entered-illegal-pay-delay-agreement. Endo previously settled these allegations with the agency. FTC Press Release, *Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges; FTC Refiles Suits Against Generic Defendants* (Jan. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/endo-pharmaceuticals-inc-agrees-abandon-anticompetitive-pay-delay.

[14] For over 15 years, pharmaceutical companies have been required to report to us when they settle patent disputes so we can assess whether those settlements contain potentially problematic provisions. This information allows us to better track trends. These reporting requirements, which Congress included in the *Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, have been extraordinarily helpful in not only identifying potential enforcement matters, but also providing policymakers with greater transparency. Congress recently extended these reporting requirements to settlements involving biologics and biosimilars; this new information will be included in the FTC's annual reports beginning in FY 2019.

[15] In the three years before *Actavis*, the agency, on average, received 139 final settlements annually. In FY 2016, we received 232 final settlements. *See* Bradley S. Albert & Jamie Towey, *Then, now, and down the road: Trends in pharmaceutical patent settlements after* FTC v. Actavis (May 28, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/then-now-down-road-trends-pharmaceutical-patent.

[16] *Id.*

[17] *Id.*

short, the FTC's efforts, though they continue to be very resource intensive, are helping to ensure that lower-cost generics come onto the market sooner, saving U.S. consumers billions of dollars.

In another matter involving pharmaceutical market competition, earlier this year the agency announced a settlement with Reckitt Benckiser, resolving allegations related to that firm's efforts to thwart generic competition to the company's Suboxone product, which is used to treat opioid addiction.[18] The FTC's complaint alleged that the company made knowingly false statements to the FDA, while engaging in a so-called "product hopping" scheme to shift existing patients away from the product about to face generic competition and onto another, more lucrative product that enjoyed patent protection and provided no legitimate incremental benefits. This is the first time the agency has brought a case under this theory.

To obtain FDA approval for a generic product, a generic pharmaceutical company must obtain samples of the corresponding brand product and conduct testing to verify that the generic version has the same therapeutic effect. Brand companies can use closed distribution systems and refuse to sell such samples to generics, thereby blocking the ability of companies to file a generic application. This conduct can occur in the context of FDA-mandated risk evaluation and mitigation strategies ("REMS") safety programs, which by law are not to be used to prevent competition, or via voluntary systems adopted by the brand company. The FTC supports legislative efforts to end this anticompetitive strategy while maintaining the FDA's ability to appropriately restrict the distribution of dangerous drugs.

The agency will continue to monitor this space carefully, and we will not hesitate to take vigorous action to protect the integrity of U.S. pharmaceutical markets where warranted.

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[18] FTC Press Release, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc.

C. Competition in Technology Markets

New technologies can offer real consumer benefits, but they can also raise complex and sometimes novel competition issues. We have prioritized efforts to monitor, study, and, where necessary, bring enforcement actions to maintain competition in technology markets. We are undertaking these efforts not only in connection with the technology platforms that are the focus of this Committee's ongoing investigation, but also with respect to technologies employed by companies throughout the economy that are changing and challenging competition. The FTC's Bureau of Competition this year announced a shift in internal resources to establish a Technology Enforcement Division,[19] a dedicated group that will monitor competition in U.S. technology markets and recommend enforcement action when warranted.

Recently, the FTC voted unanimously to initiate litigation in federal court against Surescripts.[20] The FTC's complaint alleges that Surescripts is a monopolist in two two-sided platform markets associated with electronically transmitted drug prescription information.[21] The complaint alleges that Surescripts structured its contracts to lock customers into exclusive arrangements, providing "loyalty" discounts that would make it unattractive for buyers to shift their business away to Surescripts' rivals. Through a web of exclusive arrangements and other exclusionary conduct, the complaint alleges, Surescripts was able to protect its dominant position in these markets, to the detriment of U.S. consumers.

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[19] Patricia Galvin & Krisha Cerilli, *What's in a Name? Ask the Technology Enforcement Division* (Oct. 16, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division; *see also* FTC Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets* (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology. This specialized group includes seasoned career attorneys with significant prior experience in complex markets, including markets for online advertising, social networking, mobile device markets, and technology platforms, and will include a technology fellow who will provide technical support to the division.

[20] FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[21] *Id.*

In another recent matter, the Commission ruled that 1-800 Contacts had unlawfully entered into agreements with rivals to restrict the scope of truthful, non-deceptive online advertising.[22] The conduct at issue involved agreements among competitors not to bid in auctions for certain keywords conducted by online search sites. The Commission found that consumers were deprived of information they could have used to compare and evaluate offerings from competing online sellers to obtain lower priced contacts. As the Commission learned through its earlier research program on advertising restrictions, agreements among competitors to restrict otherwise lawful advertising can blunt competitive rivalry and thereby reduce competitive pressure.[23] The FTC continues to monitor closely the behavior of participants in these and other critical technology markets.

As outlined in Commission testimony from last month,[24] current law provides the Commission with several potential avenues to counter anticompetitive conduct by large technology firms that seek to thwart nascent and potential threats by acquisition or other means. For instance, when evaluating mergers in dynamic markets, the Commission pays particularly close attention when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales. Last year, the FTC relied on Section 7 of the Clayton Act to challenge the merger of market leader CDK Global and its far smaller competitor, Auto/Mate, because Auto/Mate's outsized impact meant that the merger would dampen competition from a key emerging rival. According to the complaint, the transaction would have

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[22] FTC Press Release, *FTC Commissioners Find That 1-800 Contacts Unlawfully Harmed Competition In On-Line Search Advertising Auctions, Restricting the Availability of Truthful Advertising to Consumers* (Nov. 14, 2018) https://www.ftc.gov/news-events/press-releases/2018/11/ftc-commissioners-find-1-800-contacts-unlawfully-harmed. Commissioner Noah Joshua Phillips dissented, and Commissioner Christine Wilson did not participate. This matter is currently on appeal.

[23] *See, e.g., Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

[24] Prepared Statement of the Federal Trade Commission before the S. Comm. on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf.

reduced competition in the already-concentrated market for specialized platform business software used by U.S. franchise automotive dealers, known as dealer management systems.[25] The Commission also is mindful that this kind of dynamic analysis may be required when the relevant products involve data. For example, in 2014 the Commission moved to block Verisk Analytics, Inc.'s proposed acquisition of EagleView, alleging that the proposed transaction would result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by insurers to estimate repair costs for property damage claims.[26] Verisk had recently entered into direct competition with EagleView by developing its own library of high-resolution aerial images, and the elimination of the firms' ever-closer competition would likely lead to higher prices and reduced incentives to innovate.

The Commission has relied on a theory of potential competition to require relief in numerous pharmaceutical markets where one firm had a product on the market while the other merging firm had a product in development that would likely provide important competition in the near future.[27] The FDA must approve pharmaceutical products in specific stages, which provides a degree of transparency and predictability as to the timing of potential entry of a new drug. Moreover, the Commission's experience in pharmaceuticals markets allows us to project the likely procompetitive effect of a new drug.[28] Of course, there are always challenges to

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[25] *In re CDK Global*, Dkt. 9382 (complaint filed Mar. 20, 2018). Shortly after the FTC issued its complaint, the parties abandoned their proposed transaction.

[26] FTC Press Release, *FTC Challenges Verisk Analytic, Inc.'s Proposed Acquisition of EagleView Technology Corporation* (Dec. 16, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition. The parties dropped their plans after the Commission issued its complaint.

[27] *See* Fed. Trade Comm'n, *Overview of Action in Pharmaceutical Products and Distribution* (August 2018), list of cases included in Potential Competition Mergers, at 60-67 and Innovation Market Mergers at 67-68, https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_august_2018.pdf.

[28] Fed. Trade Comm'n, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* ii-iii (2011), http://www.ftc.gov/sites/default/files/documents/reports/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission.pdf (the first generic competitor's product is typically offered at a 20 to 30 percent discount to the brand product); Fed. Trade Comm., *Pay-For-Delay: How Drug Company Pay-offs Cost Consumers Billions* 8 (2010), http://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-

predicting future entry and convincing a court that entry is likely.[29] Future competition cases pose challenges in weighing and assessing evidence, since predictions about entry can often be called into question.[30]

In markets beyond the pharmaceutical arena, the Commission has applied a similar analysis where neither of the merging firms has a commercially available product, but both are among only a few likely entrants into a future market. For example, in the 2013 merger involving Nielsen and Arbitron, both companies were developing cross-platform measurement services to measure viewership across TV, the Internet, and other platforms. Both firms had developed plans, invested money, and reached out to customers to begin marketing beta versions of those products. Based on these independent efforts, customers believed that Nielsen and Arbitron eventually would compete directly to provide national syndicated cross-platform measurement services. The Commission concluded that each company could be considered a likely future entrant, and that eliminating the future offering of one firm would likely lessen competition.[31]

Under certain circumstances, the acquisition of an emerging or nascent competitor may constitute anticompetitive conduct that illegally maintains a monopoly position. In 2017, the FTC charged that Questcor illegally maintained its monopoly in the United States for a drug

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cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf (subsequent generic entry creates greater price competition, with discounts of 85 percent or more off the price of the brand name drug).

[29] In *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015), the district court rejected the Commission's motion for a preliminary injunction to stop the merger of Steris Corporation, one of only two companies providing sterilization services to medical device firms in the United States, and Synergy Health plc, a British company with plans to expand into the United States with a new, possibly superior, sterilization technology. The court found that Synergy's entry was not probable if the merger did not occur, and allowed the merger to proceed. The Commission later dismissed its administrative complaint. *In re Steris Corp. and Synergy Health plc*, Dkt. No. 9365 (May 29, 2015).

[30] In a typical horizontal merger, competitive concerns arise from a merger that eliminates actual and direct competition between the merging parties. In a merger between an established incumbent and a potential entrant, the competitive concern arises from the elimination of the possibility of direct competition that does not currently exist, and will not be realized if the merger proceeds.

[31] *In re Nielsen Holdings, N.V. and Arbitron Inc.*, Dkt. C-4439 (Sept. 20, 2013), https://www.ftc.gov/enforcement/cases-proceedings/131-0058/nielsen-holdings-nv-arbitron-inc-matter. The Commission approved the divestiture of Arbitron's cross-platform audience measurement services to comScore, Inc.

called Acthar that treated infantile spasms and other conditions. Outside of the United States, another drug, Synacthen, was sold in direct competition with Acthar. Questcor (later acquired by Mallinckrodt) bought the U.S. rights to Synacthen, outbidding several other companies for those development rights. The anticompetitive effects of this conduct were substantial because it deprived consumers of the chance that a competitor to an extraordinarily expensive lifesaving drug would emerge but for the acquisition, and, according to the complaint, Questcor had no legitimate business purpose for buying Synacthen other than eliminating a nascent competitor that threatened its Acthar monopoly. In the stipulated final order, Mallinckrodt agreed to pay $100 million in equitable monetary relief in addition to divesting the Synacthen assets.[32]

Given the importance of these markets to consumers and to the economy, the Commission is committed to vigorous enforcement of the antitrust laws to promote current and future competition in critical technology markets.

II. Competition Policy Work

Although the Commission primarily relies on targeted law enforcement to protect competition and consumers, we also have robust research and policy functions. We do independent research; we conduct public workshops; and we share our expertise on competition issues with interested policymakers through our active amicus and advocacy programs.

Critical self-evaluation is an important part of our research agenda. For instance, in 2017, the FTC released a large retrospective study of remedies associated with mergers completed from 2006 through 2012.[33] The findings of this study helped to refine agency best practices

[32] FTC Press Release, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.
[33] *See* Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics, January 2017, at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

related to the merger remedy process. The Commission's Bureau of Economics also has a longstanding program to perform retrospective studies of consummated mergers, which began in the early 1980s and recently has become considerably more active. Probably the most prominent of the FTC's retrospective studies so far is the hospital merger retrospective project, which played a crucial role in reinvigorating the agency's hospital merger enforcement efforts.[34] FTC economists also have completed a number of retrospective analyses of horizontal and vertical transactions in health care, oil-related markets, consumer products markets, and retailing.[35]

FTC studies also can inject competition considerations into broader policy questions of significant public interest. A recent example is the 2016 Patent Assertion Entity study,[36] which evaluated the business practices of patent assertion entities ("PAEs"), firms that acquire patents in order to attempt to generate revenue by licensing or suing accused infringers. The report provided several recommendations for patent litigation reforms.

The FTC continues to pursue important competition policy research. In November 2017, the Commission launched a project encouraging academic and industry research on the impact of certificates of public advantage ("COPAs") on prices, quality, access, and innovation in health

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[34] *See* Joseph Farrell, Paul A. Pautler & Michael G. Vita, *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. OF INDUS. ORG. 369 (2009).

[35] *See, e.g.*, Thomas Koch, Brett Wendling, & Nathan Wilson, *The Effects of Physician and Hospital Integration on Medicare Beneficiaries' Health Outcomes* (Bureau of Economics, Working Paper No. 337, July 2018); F. David Osinski & Jeremy Sandford, *Merger Remedies: A Retrospective Analysis of Pinnacle/Ameristar* (Bureau of Economics, Working Paper, May 2018); Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market* (Bureau of Economics, Working Paper No. 333, Aug. 2017); Daniel J. Greenfield, Nicholas M. Kreisle, & Mark D. Williams, *Simulating a Homogeneous Product Merger: A Case Study on Model Fit and Performance* (Bureau of Economics, Working Paper No. 327, Oct. 2015); Daniel Hosken, Luke Olson, & Loren Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Bureau of Economics, Working Paper No. 313, Dec. 2012) – Published in the Journal of Economics and Management Strategy (Spring 2018). Research conducted by staff of the Bureau of Economics is available at https://www.ftc.gov/policy/reports/policy-reports/economics-research, and a full list of all completed FTC merger retrospectives is available at https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf.

[36] Fed. Trade Comm'n, Patent Assertion Entity Activity, An FTC Study (Oct. 2016) https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf

care services.[37] COPAs are state regulatory frameworks intended to replace health care provider competition and immunize mergers and collaborations from antitrust scrutiny. The Commission has been concerned about the impact of COPAs on consumers, and has undertaken a broad effort to gather additional evidence on their effects. In particular, the FTC has encouraged original empirical research. At the FTC's June 2019 workshop, current and former staff from the Bureau of Economics discussed preliminary results from three original empirical studies of the price effects of mergers approved in the 1990s.[38] Last month, the Commission issued 6(b) orders to five health insurance companies and two health systems to collect data and information to conduct a retrospective study of two COPAs to examine the effects on prices, quality, access, and innovation for healthcare services, as well as on health system employee wages.[39]

The FTC is in the process of concluding a prominent policy initiative: its *Hearings on Competition and Consumer Protection in the 21st Century*. This extensive series of public hearings was convened to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and competition policy. The current set of hearings was modeled after a similar effort in 1995 by former FTC Chairman Bob Pitofsky, which was the first step in establishing the FTC as a modern center for "competition R&D."

The FTC worked to feature a wide variety of perspectives in these hearings. We invited legal and economic academics and consultants, public interest groups, public advocacy groups,

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[37] FTC Press Release, *FTC Staff Seeks Empirical Research and Public Comments Regarding Impact of Certificates of Public Advantage* (Nov. 1, 2017) https://www.ftc.gov/news-events/press-releases/2017/11/ftc-staff-seeks-empirical-research-public-comments-regarding.
[38] *See* A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets. (Jun. 18, 2019), at https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf.
[39] FTC Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019) https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas.

and representatives of businesses and industries to our hearing sessions. By the conclusion of our final hearing on June 12, 2019, we had convened 14 sessions over 23 days, with thousands of people attending via webcast or in person. To date, we have received close to 950 unique comments on the covered topics. All the information related to the hearings—the transcripts, comments, presentations, and questions—is available on the FTC website. This large corpus of material on the critical issues facing modern competition and consumer protection policy has already created a valuable resource for future research by the agency, interested academics, practitioners, and policymakers.

At this stage, we are distilling the large volume of stakeholder input and generating further output, such as reports, statements, guidance, and speeches. As we have previously announced, we are prioritizing work involving platform competition, vertical mergers, and international initiatives.[40] This work will be forward-looking and will both support the Commission's enforcement mission and identify additional policy initiatives that may be important in shaping the future development of antitrust law. We expect to begin releasing some of this output soon.

Through these hearings, the Commission intends to help formulate an enduring approach to current questions about antitrust and consumer protection enforcement. We recognize that, in some areas of the law, some now question the policies that have served as the basis for what had long been a bipartisan consensus. Particularly with respect to certain antitrust issues where this consensus has been questioned, we believe these hearings were a valuable investment of our resources to determine whether adjustments are necessary.

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[40] Prepared Remarks of Chairman Joseph Simons, 46th Conference on International Antitrust Law and Policy (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544082/simons_-_fordham_speech_on_hearings_output_9-13-19.pdf.

III. International Engagement – Competition

In support of its competition mission and domestic antitrust enforcement, the FTC engages in significant work with international counterparts and organizations. The FTC works regularly with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound competition policies and procedures. In FY 2019, the FTC cooperated on 36 merger and anticompetitive conduct investigations of mutual concern with counterpart agencies from 21 jurisdictions. Many of these matters involved cooperation with several agencies to achieve effective, sound, and consistent outcomes. For example, with respect to the recent merger of industrial gas suppliers Praxair, Inc. and Linde AG, Commission staff worked cooperatively with staff from the antitrust agencies of Argentina, Brazil, Canada, Chile, China, Colombia, the European Union, India, Korea, and Mexico to analyze the proposed transaction and potential remedies.

The U.S. antitrust agencies also promote convergence toward sound policy through bilateral engagement with foreign competition agencies and by playing a leadership role in multilateral competition organizations. In FY 2019 we held high-level bilateral meetings with colleagues from several competition authorities around the world, including those from Canada, the European Union, India, Japan, Korea, and Mexico. Consistent with our objectives of promoting sound practices and processes, our discussions covered timely issues, including digital platforms, vertical mergers, procedural fairness, and the antitrust treatment of the exercise of intellectual property rights. Fostering both cooperation and convergence, the FTC's technical assistance program conducted 29 missions in 19 jurisdictions in FY 2019, including the placement of resident advisors in the competition agencies of Brazil, the Philippines, and Ukraine. Pursuant to its authority under the US SAFE WEB ACT, the FTC also hosted

"International Fellows" from foreign competition agencies to work directly with FTC staff to gain first-hand understanding of and experience with the practices and approaches that the FTC uses in its enforcement, which they then bring back to their agencies. The FTC has hosted 87 competition officials from 31 jurisdictions since the program's inception in 2007 through the end of FY 2019.

The FTC plays a central role in key multilateral fora dedicated to promoting sound competition policy and enforcement around the world. The FTC serves on the Steering Group of the 139-member International Competition Network ("ICN") and is active in ICN working groups that draft recommendations. For example, the FTC led the development of the ICN Recommended Practices for Investigative Process—the most comprehensive consensus best practices for competition agencies on providing due process in antitrust investigations. We also lead the ICN's efforts to promote implementation of its many work products on key topics such as merger review, the analysis of dominant firm conduct, and the conduct of effective and fair investigations. We will have additional opportunities to showcase successful U.S. experience when the U.S. antitrust agencies jointly host the ICN's annual conference next year.

Finally, the FTC works with other U.S. government agencies to address in a coordinated and effective manner competition issues that implicate broader U.S. policy interests, such as the protection of intellectual property and non-discriminatory treatment of U.S. companies, internationally, *e.g.*, recently with China and Korea. In addition, the FTC worked with the Departments of Treasury, Justice, and State, among others, on developing G7, G20, and OECD ministerial statements to achieve outcomes that furthered U.S. policy and interests involving competition in the digital economy.

IV. Conclusion

The FTC remains committed to marshalling its resources efficiently in order to protect consumers and promote competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. We look forward to continuing to work with this Subcommittee and Congress, and we would be happy to answer your questions.

Mr. CICILLINE. Thank you, Chairman.
I now recognize Mr. Delrahim for 5 minutes.

TESTIMONY OF MAKAN DELRAHIM

Mr. DELRAHIM. Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, Chairman Nadler, and distinguished members of this subcommittee. Thanks for inviting me to be before you today at this oversight hearing.

We begin by thanking the subcommittee for continuing the bipartisan support of the Antitrust Division's work to protect competition on behalf of American consumers, workers, and entrepreneurs. I also want to thank you for your leadership and oversight of some of the most challenging issues of today, such as the competitive impact of online platforms.

We have submitted a longer statement for the record. In the interest of time, I just wanted to highlight a couple of the issues just for your benefit and the committee's benefit here.

Recently, just this past week, we announced the formation of the Procurement Collusion Strike Force. It's an effort with U.S. attorneys across the country, the FBI, the Department of Defense's DCIS, as well as a number of inspectors general, and our efforts there are to detect, prevent, and prosecute criminal activity, especially when taxpayers are the victims at all levels of the government.

I will place some of the other general matters of our statement in the record. We will, with your permission, supplement the previous statement. But I wanted to highlight a few of those, but I want to get into the issue that is germane to your particular interest in this hearing, which is the online platforms and our activity there.

Related to that, I should also mention that we—that the United States sought and was granted the privilege of hosting for the first time the ICN's, the International Competition Network's annual conference. This is the most important conference of global competition enforcement agencies, and our host status for the 2020 ICN will allow the Antitrust Division and the Federal Trade Commission to showcase our ideals by promoting fundamental due process as well as a broad range of important policy issues, including digital platform competition and cartel enforcement at this event next May.

Now on to the Department's activities in digital platform markets. I know the subcommittee continues to focus on the way that consumers engage with online platforms. I'm pleased to report that the division is hard at work reviewing business practices by market-leading online platforms, which we announced in July.

To date, Facebook and Google have both publicly disclosed investigations by the division. These companies are not the only focus of our review. They are, however, an important part because of the significant role they play in the lives of so many American citizens and because they occupy a unique role in the modern era of personalized advertising supported by user data.

The work we are doing is focused in part on understanding how personalized advertising transactions work and their competitive dynamics. We're looking at how these dynamics create value for ad-

vertisers, content creators, and the American consumers who use these advertising-supported platforms.

By understanding these competitive dynamics, we can determine if the market leaders have monopoly power, how do they exercise such monopoly power, and whether the source of that power is from merits-based competition or if the source of that power is exclusionary or anticompetitive conduct.

Other online platforms make money in other ways, and we are reviewing those other business models as well.

The common thread is this: Online platforms bring together users who access information services on the platform with third party providers, products, services, or advertisement. We're concerned with the ways that the platform operators can manipulate the conditions for competition.

In some instances, the platform operators may have the incentive to improve the platform for the benefit of all of those users. In other instances, the platform operator also may compete against users of the platform and may have an incentive to disadvantage or exclude competitors.

Of course, the division did not begin its work investigating online platforms when we announced the reviews in July. Indeed, we've had a section dedicated to industries governed by information technology and network effects for more than 20 years.

It was this section that in 2008 investigated and decided to file suit against Google and Yahoo for an agreement that would have eliminated Yahoo as an independent source of online search advertising. This tech section coordinated its investigation with 15 States and Canada, and ultimately, the parties dropped their plans for the agreement rather than face a lawsuit in this field.

That section also dealt with online zero price business models and in 2012 litigated and won an injunction against H&R Block and TaxACT, that merger. The challenge was in part based on evidence that TaxACT was a maverick online startup that threatened the behemoth incumbent with a freemium business model in the market for online tax preparation services.

The division also investigated and secured a settlement in Google ITA in 2015. That settlement resolved allegations in the complaint that Google's merger with a producer of airfare pricing and shopping systems would harm competition among online flight search platforms, resulting in reduced choice and less innovation for consumers.

Although I'm not able to discuss the particulars of our ongoing investigations, I think these examples of past cases, along with some recent public remarks, can assure you that the Antitrust Division will ask the right questions as we investigate whether any platform acquired or maintained its monopoly power through anticompetitive conduct.

I look forward to your questions.

[The statement of Mr. Delrahim follows:]

Department of Justice

STATEMENT OF

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

"OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS"

NOVEMBER 13, 2019

The Department was not notified of the new scope of the hearing until Friday November 8, 2019. Because of the late notice of the change, we are unable to clear written testimony specific to the hearing's narrowed subject matter. The Department respectfully requests the opportunity to supplement Assistant Attorney General Delrahim's written testimony after the hearing with cleared testimony on the new subject matter, as it deems necessary.

STATEMENT OF
MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
SUBOMMITTEE ON ANTITRUST, COMMERCIAL
AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
FOR A HEARING ENTITLED
"OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS"
NOVEMBER 13, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, it is an honor for me to appear before you today on behalf of the Antitrust Division of the Department of Justice. This Committee enables our efforts to enforce the antitrust laws effectively, in order to ensure that our markets continue to be competitive and benefit American consumers. I want to thank Chairman Cicilline and Ranking Member Sensenbrenner in particular for your steadfast support of the Division's efforts.

History has taught us that properly functioning competitive markets result in innovation, lower prices, and higher quality goods and services. As the Assistant Attorney General for the Antitrust Division, I take immense pride in the important work of the Division's antitrust enforcement and competition advocacy, which support the free-market competition at the heart of the American economy. Cognizant of the importance of our mission, we at the Antitrust Division strive to maximize the effectiveness of our efforts to protect the American consumer.

Despite limited resources to address ever-evolving and complex markets, the Division has risen to the occasion. My testimony today will review our extensive efforts in criminal and civil enforcement, our work in competition advocacy and policy, and our efforts to promote competition internationally.

Criminal Enforcement

Our criminal program also has been very active. We had 102 pending grand jury investigations at the close of FY 2019, the highest total since 2010. In addition to two trials this fall, we are preparing for two trials scheduled to begin between January and February. Since April alone, we have announced the first charges in six investigations.[1]

[1] All statistics are up to date as of November 1, 2019.

The Division's work protects more than the interests of consumers; it protects the interests of taxpayers as well. Five South Korean companies pleaded guilty, and agreed to enter into civil settlements, for rigging bids on U.S. government fuel supply contracts.[2] Together the companies must pay over $150 million in criminal fines and an additional $200 million in civil damages for their involvement in a decade-long bid-rigging conspiracy affecting contracts to supply fuel to the U.S. Army, Navy, Marine Corps, and Air Force bases in South Korea. The civil recoveries are the largest the Antitrust Division has obtained under Section 4A of the Clayton Act, which permits the United States to obtain treble damages when it has been injured by an antitrust violation.

These cases, which also resulted in pending charges against seven executives, required cooperation among the Antitrust Division's civil and criminal sections, the Department of Justice's Civil Division, the U.S. Attorney's Office for the Southern District of Ohio, and agents from the Federal Bureau of Investigation and Department of Defense. These cases will help set an example for how separate criminal and civil investigations can satisfy the twin objectives of holding companies and individuals accountable for their criminal conduct while expanding the Division's Section 4A recovery efforts. Moreover, the charges arising out of this investigation protect the integrity of our Defense Department's acquisition process and help ensure the U.S. military receives goods and services at the best possible prices.

In another example of the Division's commitment to safeguarding taxpayer dollars, in September, a former city official and a former executive were each sentenced to 12 months in prison after they pleaded guilty to a fraud scheme involving the federally funded Detroit Demolition program.[3]

To further these efforts, just last week, on November 5th, the Deputy Attorney General joined me in announcing the establishment of the Procurement Collusion Strike Force (PCSF). The PCSF is a partnership composed of the Antitrust Division, the U.S. Attorneys' Offices for thirteen districts around the country, the FBI, and the Inspectors General for several federal agencies. Combining the experience and expertise of these partner agencies, the PCSF will lead a coordinated national response to combat antitrust crimes and related schemes in procurement at all levels of government—federal, state, and local. Specifically, the PCSF's objectives will be, first, to deter and prevent antitrust and related crimes on the front end of the procurement process, thereby protecting taxpayer dollars before they are lost to criminal conduct, and second,

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[2] Press Release, U.S. Dep't of Justice, More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (Mar. 20, 2019), https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense.

[3] Press Release, U.S. Dep't of Justice, Former Executive at Adamo Group Sentenced for Conspiracy to Commit Honest Services Fraud in Connection with the Detroit Demolition Program (Sept. 10, 2019), https://www.justice.gov/opa/pr/former-executive-adamo-group-sentenced-conspiracy-commit-honest-services-fraud-connection; Press Release, Former City of Detroit Building Authority Official Sentenced for Bribery Conspiracy in Connection with Detroit Demolition Program (Sept. 23, 2019), https://www.justice.gov/opa/pr/former-city-detroit-building-authority-official-sentenced-bribery-conspiracy-connection.

to facilitate more effective investigation and prosecution of these crimes on the back end of the procurement process.

The Division's commitment also extends to policing consumer markets that impact Americans at the grocery store. This fall, after nearly a year of litigation, StarKist Co. was sentenced to pay a $100 million, statutory maximum criminal fine for its role in a conspiracy to fix prices for canned tuna sold in the United States.[4] This result exemplifies the Division's commitment to protecting consumers when collusion affects items that stock kitchen shelves, along with the Division's resolve to hold corporate violators to account at a litigated sentencing.

The Division's recent investigations have also included international conspiracies involving electronic components. In July, NHK Spring Co., a Japanese manufacturer of suspension assemblies used in hard disk drives, agreed to plead guilty and pay a $28.5 million fine for its role in a global price-fixing conspiracy.[5]

As American consumers purchase more online, they should know that the antitrust laws protect them from collusion in online markets. In January, a former e-commerce executive pleaded guilty to conspiring to fix the prices of posters sold online and was sentenced to serve six months.[6] This indictment is part of the Division's first online marketplace prosecution involving algorithmic pricing tools. The Division has also worked to prosecute companies and executives who fixed prices for customized promotional products sold through websites. The conspiracy not only corrupted online markets, but was carried out using social media platforms and encrypted messaging applications such as Facebook, Skype, and WhatsApp. To date, 11 defendants have been charged; five individuals and four companies have pleaded guilty, resulting in jail time for each executive and corporate criminal fines totaling nearly $10 million.[7]

Another recent criminal investigation resulted in significant prison sentences for guilty executives. At the beginning of the summer, two freight transportation executives were sentenced for their role in a conspiracy to fix prices of international freight forwarding services. The price fixing agreement, which raised prices by as much as 20 percent, victimized everyday consumers sending gifts and household goods to loved ones for the holidays. The CEO of a Louisiana-based freight-forwarding company was sentenced to 18 months' imprisonment, and the company's manager was sentenced to 15 months. Each executive also was sentenced to pay a $20,000 criminal fine and three years of supervised release. In October, a third freight executive pleaded guilty for her role in the price-fixing conspiracy and will be sentenced at a later date.

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[4] Press Release, U.S. Dep't of Justice, StarKist Ordered to Pay $100 Million Criminal Fine for Antitrust Violation (Sept. 11, 2019), https://www.justice.gov/opa/pr/starkist-ordered-pay-100-million-criminal-fine-antitrust-violation.

[5] Press Release, U.S. Dep't of Justice, Japanese Manufacturer Agrees to Plead Guilty to Fixing Prices for Suspension Assemblies Used in Hard Disk Drive, https://www.justice.gov/opa/pr/japanese-manufacturer-agrees-plead-guilty-fixing-prices-suspension-assemblies-used-hard-disk.

[6] Press Release, U.S. Dep't of Justice, Former E-Commerce Executive Pleads Guilty to Price Fixing; Sentenced to Six Months (Jan. 28, 2019), https://www.justice.gov/opa/pr/former-e-commerce-executive-pleads-guilty-price-fixing-sentenced-six-months.

[7] Press Release, U.S. Dep't of Justice, E-Commerce Company Pleads Guilty to Antitrust Charge (June 27, 2019), https://www.justice.gov/opa/pr/e-commerce-company-pleads-guilty-antitrust-charge.

Additionally, in June, a district court unsealed the indictment of two Norwegian shipping executives charged with participating in a long-running conspiracy to allocate certain customers and routes, rig bids, and fix prices for the sale of international ocean shipments. These executives remain fugitives.

The Division continues its effort to prosecute wrong-doing in the financial services industry. Last spring, two broker-dealers pleaded guilty to rigging bids for American Depository Receipts, negotiable securities that represent the shares of foreign stocks and enable Americans to invest in foreign companies, and were sentenced to pay criminal fines of more than $5 million collectively.[8] In addition, a former trader at one of the broker-dealers pleaded guilty for his participation in the bid-rigging conspiracy and is scheduled to be sentenced later this month.

The Antitrust Division also continues its efforts to identify and prosecute unlawful conduct in the generic pharmaceuticals industry—which is of vital importance to many Americans. To date, two executives have pleaded guilty to criminal antitrust violations,[9] and a company, Heritage Pharmaceuticals Inc., was charged and entered into a deferred prosecution agreement with the Antitrust Division.[10]

Since April, two individuals have pleaded guilty in the Division's investigation into bid rigging at online auctions for surplus government equipment, which protects our government from paying unlawfully inflated prices.[11] These prosecutions have put on notice companies that engage in anticompetitive conduct to the detriment of our government and taxpayers.

Criminal enforcement of the Sherman Act is an essential tool to protect competition and consumers. Criminal enforcement can be resource intensive, but it is one of our most powerful deterrents against serious violations such as price-fixing, bid-rigging, and market allocation that unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free-market system. Such harmful agreements among competitors are subject to a rule of per se illegality, and individuals who engage in such conduct—including high-level executives—appropriately face criminal accountability along with the corporations they serve.

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[8] Press Release, U.S. Dep't of Justice, Second New York Broker-Dealer Pleads Guilty to Rigging Bids for Financial Instruments in Violation of Antitrust Law (June 14, 2019), https://www.justice.gov/opa/pr/second-new-york-broker-dealer-pleads-guilty-rigging-bids-financial-instruments-violation; Press Release, U.S. Dep't of Justice, New York Broker-Dealer Pleads Guilty To Violating U.S. Antitrust Laws by Rigging Bids for Financial Instruments (May 10, 2019), https://www.justice.gov/opa/pr/new-york-broker-dealer-pleads-guilty-violating-us-antitrust-laws-rigging-bids-financial; Press Release, U.S. Dep't of Justice, Former Financial Services Executive Pleads Guilty to Rigging Bids for financial Instruments in Violation of Antitrust Law (June 27, 2019), https://www.justice.gov/opa/pr/former-financial-services-executive-pleads-guilty-rigging-bids-financial-instruments.

[9] Press Release, U.S. Dep't of Justice, Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging and Customer Allocation (Dec. 14, 2016), https://www.justice.gov/atr/case-document/file/918276/download

[10] Press Release, U.S. Dep't of Justice, Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019), https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false.

[11] Press Release, Texas Bidder Pleads Guilty to Rigging Bids at Online Auctions for Surplus Government Equipment (Apr. 10, 2019), https://www.justice.gov/opa/pr/texas-bidder-pleads-guilty-rigging-bids-online-auctions-surplus-government-equipment.

The threat of prison for corporate decision-makers cannot easily be dismissed as the cost of doing business and thus serves as a powerful deterrent.

Given the importance of the per se rule to our criminal program, it is notable that a number of criminal defendants this past year tried to argue that the rule of reason applies to anticompetitive conduct that has long been condemned as categorically illegal. Unlike the per se standard, the rule of reason requires the court to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to determine whether the practice is unlawful. In each such case, the court ruled that the Division's application of the per se rule was correct. One noteworthy case involves heir location providers, a service to identify people who may be entitled to an inheritance from someone who died without a will. The service providers enter into contracts with those people to help secure their inheritances in exchange for a fee.

The Division charged an heir location services provider and its co-owner with entering a conspiracy with another provider to suppress and eliminate competition between them on estates they both pursued. The charge alleged that the two companies agreed that when they contacted the same heir, the first company to contact the heir would win the business and the second would not compete for that and certain remaining heirs. In exchange, the first would share a portion of the contingency fees ultimately collected from those allocated heirs. The Division was surprised when the district court agreed with defendants that they should be tried under the rule of reason and granted a motion to dismiss on statute of limitations grounds. Subsequently, the Tenth Circuit reversed the district court's dismissal and ruled it did not have jurisdiction to address the application of the rule of reason, but encouraged the district court to reconsider its rule of reason order. In February of this year, in a victory for the Division and for consumers, the district court reconsidered and found that the per se standard applied. Both defendants pleaded guilty in July.

When I addressed you last December, I described the Division's efforts prosecuting bid rigging and fraud relating to real estate foreclosure auctions. To date, 140 individuals have been charged, of whom more than 120 have pleaded guilty and 12 individuals were convicted after trial. Those efforts continue. Last winter, nine real estate investors were sentenced for their role in a conspiracy to rig bids at public real estate foreclosure auctions in Southern Mississippi.[12] One defendant awaits trial in Sacramento. Our enforcement efforts will continue to protect competition in such markets and hold accountable investors who conspire to line their pockets through illegal bid rigging and fraud while diverting money from the homeowners and mortgage holders entitled to any proceeds.

On July 11, the Division announced policy changes to incentivize corporate compliance. Division prosecutors, consistent with Department of Justice policy, now consider corporate compliance programs at the charging stage in criminal antitrust investigations. Crediting compliance at charging is the next step in our efforts to deter antitrust violations and reward good corporate citizenship. A company with a robust compliance program can actually prevent crime or detect it, minimizing harm to consumers early and saving precious taxpayer resources. In

[12] Press Release, U.S. Dep't of Justice, Nine Real Estate Investors Sentenced for Rigging Bids at Mississippi Public Foreclosure Auctions (Feb. 21, 2019), https://www.justice.gov/opa/pr/nine-real-estate-investors-sentenced-rigging-bids-mississippi-public-foreclosure-auctions.

concert with these changes, to promote transparency, we also announced revisions to our Division Manual. For the first time, we published a public guidance document that outlines what Division prosecutors look for when evaluating antitrust compliance programs.

Stepping back, the provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) have substantially strengthened the Antitrust Division's ability to detect and prosecute anticompetitive cartel activity through its Corporate Leniency Policy. Leniency applications have led to the majority of the Antitrust Division's international cartel prosecutions, resulting in substantial fines, prison sentences, and opportunities for recovery for victims. Several provisions of ACPERA are set to expire on June 22, 2020 pursuant to a sunset provision in the original legislation. An extension of ACPERA will allow the Department of Justice and victims of criminal antitrust violations to continue to benefit from this successful program. The Department supports the reauthorization of ACPERA and the elimination of the sunset provision.

More broadly, the Division will continue diligently to detect and deter collusion that harms American consumers, and we will remain focused on industries that have profound effects on Americans' lives.

Civil Enforcement

Mergers

Mergers can be an important tool for increasing productivity in the U.S. economy—by combining complementary assets or increasing scale—but they also can threaten harm to competition. Protecting American consumers and businesses from anticompetitive mergers is an essential element of the Division's mission. Though our resources have limits, we review, and when necessary challenge, mergers whose scope and complexity span the U.S. economy, including healthcare, advanced technology, and U.S. Government procurement. We continue to invest substantial portions of our limited resources to our merger review program to protect consumers, as well as taxpayers, and preserve competition.

On July 26, 2019, we announced[13] that the Department of Justice and attorneys general for five states[14] had reached a settlement with T-Mobile and Sprint regarding their proposed merger. The settlement requires a substantial divestiture package in order to enable a viable facilities-based competitor to enter the market. To obtain merger clearance, the companies promised to sell Sprint's prepaid business and certain spectrum assets to Dish Network. The merger and accompanying divestiture expand output significantly by ensuring that large amounts of currently unused or underused spectrum are made available to American consumers in the form of high quality 5G networks.

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[13] Press Release, U.S. Dep't of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

[14] Four additional states have since joined the settlement. *See* Press Release, U.S. Dep't of Justice, Justice Department Welcomes Arkansas Joining T-Mobile/Sprint Settlement (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-welcomes-arkansas-joining-t-mobilesprint-settlement.

In addition to securing divestitures and remedies, the Division—even with its constrained resources—remains willing and able to litigate when a proposed acquisition is likely to substantially lessen competition in a relevant market. For instance, the United States filed a complaint in August to enjoin a proposed merger between Sabre and Farelogix. The Division's investigation found that the merger would eliminate head-to-head competition to provide booking services to airlines and that Sabre seeks to acquire Farelogix to eliminate a disruptive competitor that has introduced new technology to the travel industry and is poised to grow significantly. We look forward to litigating the case and preventing Sabre from stifling competition in the travel industry.

In September, the Division filed suit to block the merger between two of only four North American manufacturers of rolled aluminum sheet for automotive applications.[15] In a novel approach for the Division, we agreed with the defendants to refer the matter to binding arbitration. Alternate dispute resolution is an important tool that the Antitrust Division can and will use, in appropriate circumstances, to maximize the effectiveness of its enforcement resources in protecting American consumers.

At the beginning of the summer, we also pursued an injunction against the merger between Quad/Graphics and LSC Communications. The Division's thorough investigation uncovered evidence that the merger would combine the only two significant providers of magazines, catalogs, and book printing services, and would deprive publishers and consumers the benefits of competition that has spurred lower prices, improved quality, and greater printing output. The parties abandoned their planned merger rather than continue with litigation.[16]

A prominent example of our efforts in healthcare is our review of the CVS Health Corporation, the nation's largest retail pharmacy chain, and its $69 billion agreement to acquire Aetna, the nation's third-largest health insurance company. Prior to the agreement, the two companies competed vigorously in the sale of individual prescription drug plans under Medicare's Part D program. On October 10, 2018, the Division filed a proposed settlement that requires Aetna to divest its nationwide individual prescription drug plan business to WellCare along with other tools Wellcare needs to compete effectively.[17] On October 25, 2018, the district court entered an order allowing the transaction to close and the settlement provisions to take effect during the pendency of the Tunney Act review process, which requires a public comment period and district court review of consent decrees. After an unusually lengthy review, the district court approved the settlement as well within the public's interest, on September 4, 2019;[18] meanwhile Wellcare completed its acquisition on November 30, 2018.

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[15] Press Release, U.S. Dep't of Justice, Justice Department Sues to Block Novelis' Acquisition of Aleris (Sep. 4, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1.

[16] Press Release, Quad/Graphics and LSC Communications Abandon Merger After Antitrust Division's Suit to Block (July 23, 2019), https://www.justice.gov/opa/pr/quadgraphics-and-lsc-communications-abandon-merger-after-antitrust-division-s-suit-block.

[17] Press Release, U.S. Dep't of Justice, Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger (Oct. 10, 2018), https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d.

[18] United States v. CVS Health Corp., Civ. No. 18-2340, 2019 U.S. Dist. LEXIS 150645 (D.D.C. Sept. 4, 2019).

As another example of the Division's continued vigilance in protecting competition in healthcare and related markets, on May 30, the Division obtained divestitures from Amcor's $6.8 billion acquisition of Bemis.[19] The competitors were two of only three significant suppliers of heat-seal, coated medical packaging products that are critical to the safe transportation and use of medical devices, and the divestiture will ensure ongoing competition in those markets.

In addition to price and quality effects, the Division also evaluates mergers for their effects on innovation. In February 2019, the Division secured divestitures from Thales in order for it to proceed with its proposed $5.64 billion acquisition of Gemalto.[20] Prior to this transaction, Thales and Gemalto were the world's leading providers of General Purpose Hardware Security Modules (GP HSMs), which are components important to complex encryption solutions used to safeguard sensitive government and corporate data. Successful entry into this market requires significant time and capital to design and develop offerings with comparable functionality, interoperability, and reliability. Competition also promotes improvements and upgrades to the quality and functionality of existing offerings. The Division secured the divestiture of the Thales GP HSM business, including certain intellectual property and research capabilities, to preserve competition to quickly develop innovative data security solutions and bring them to market.

Government procurement programs (and taxpayers) also benefit from competition to provide high-quality, low-cost goods and services—including procurement of mission critical technologies for the U.S. military. On June 20, 2019, the Division announced that it had required divestitures in a proposed merger between Harris and L3 Technologies.[21] Both companies were the only DoD suppliers of U.S. military-grade image intensifier tubes for night vision devices such as goggles and weapon sights. Under the proposed settlement, Harris must divest its entire night vision business, including its manufacturing facility, to an acquirer approved by the United States. In so doing, the divested business will preserve competition that has resulted in lower prices, higher quality, and shorter delivery times and has promoted innovation of image intensifier tubes with higher sensitivity and resolution.

The Hart-Scott-Rodino (HSR) Act—which imposes notification and waiting period requirements for transactions meeting certain size thresholds—is critical to modern antitrust enforcement because it allows the DOJ and FTC to identify and challenge anticompetitive mergers before transactions close. As such, the Division must protect the integrity of the HSR process. On June 10, the Antitrust Division filed a complaint and reached a settlement with Cannon and Toshiba for their scheme to evade the waiting period required by the HSR Act for

[19] Press Release, U.S. Dep't of Justice, Justice Department Requires Amcor to Divest Medical Flexible Packaging Assets in Order to Proceed with Bemis Acquisition (May 30, 2019), https://www.justice.gov/opa/pr/justice-department-requires-amcor-divest-medical-flexible-packaging-assets-order-proceed.

[20] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture of Thales' General Purpose Hardware Security Module Business in Connection With its Acquisition of Gemalto (Feb. 28, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestiture-thales-general-purpose-hardware-security-module.

[21] Press Release, U.S. Dep't of Justice, Justice Department Requires Harris and L3 to Divest Harris's Night Vision Business to Proceed with Merger (June 20, 2019), https://www.justice.gov/opa/pr/justice-department-requires-harris-and-l3-divest-harris-s-night-vision-business-proceed.

Canon's acquisition of a Toshiba subsidiary.[22] The transacting parties created a special purpose company to hide the transaction and evade the HSR Act waiting period so that Toshiba could quickly improve its financial statement after the public discovery of financial irregularities at the company. To resolve the charges, the companies agreed to pay $2.5 million each to settle the charges and to implement HSR compliance programs and comply with inspection and reporting requirements, among other obligations.

Conduct

The Division also continues to investigate, and when appropriate, challenge conduct that may unlawfully deprive consumers of the benefits of robust competition.

On November 15, 2018, the Antitrust Division and the North Carolina Attorney General's Office announced a settlement with Atrium Health (formerly, Carolinas HealthCare System) resolving litigation that had commenced with a June 2016 complaint.[23] Atrium used its market power in the Charlotte, N.C. area to prevent health insurers from encouraging consumers to choose healthcare providers that offer better overall value. The restrictions also constrained insurers from providing consumers and employers with information regarding the cost and quality of alternative health benefit plans. The settlement prevents Atrium from enforcing anticompetitive steering restrictions in its contracts with health insurers or otherwise preventing or penalizing procompetitive steering by insurers in the future.

The Division has found some ways to leverage its limited resources to stay vigilant against anticompetitive conduct. As one example, on May 20, the Division filed an unopposed motion to intervene in a private antitrust class action challenging alleged agreements between Duke University and the University of North Carolina not to compete for each other's medical faculty.[24] The Department joined the parties' proposed settlement agreement for the limited purpose of obtaining the right to enforce an injunction designed to prevent the maintenance or recurrence of any unlawful no-poach agreements. This case is also an example of the Division's ongoing efforts against no-poach agreements to ensure that labor markets across the economy are free from anticompetitive conduct and that workers receive the benefits of robust competition for their labor.

Of course, our work against anticompetitive conduct involves numerous industries. A recent example in media, on June 17, the Antitrust Division reached settlements with CBS, Cox, E.W. Scripps, Fox, and TEGNA to resolve a lawsuit brought as part of an ongoing investigation

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[22] Press Release, U.S. Dep't of Justice, Canon Inc., Toshiba Corporation Agree to Pay $5 Million for Violating Federal Antitrust Laws (June 10, 2019), https://www.justice.gov/opa/pr/canon-inc-toshiba-corporation-agree-pay-5-million-violating-federal-antitrust-laws.

[23] Press Release, U.S. Dep't of Justice, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018), https://www.justice.gov/opa/pr/atrium-health-agrees-settle-antitrust-lawsuit-and-eliminate-anticompetitive-steering.

[24] Press Release, U.S. Dep't of Justice, Justice Department Seeks to Intervene in Private Class Action to Enforce Prohibition on Unlawful "No-Poach" Agreements (May 20, 2019), https://www.justice.gov/opa/pr/justice-department-seeks-intervene-private-class-action-enforce-prohibition-unlawful-no-poach; the Division also filed a statement of interest in this case, as described, below.

into exchanges of competitively sensitive information in the broadcast television industry.[25] The Division already had reached settlements with seven other broadcast television companies resulting from the same investigation last November and December.[26] By exchanging information, the broadcasters were better able to anticipate their competitors' inventory levels and pricing conduct, which in turn helped inform the stations' own pricing strategies and negotiations with advertisers. As a result, the information exchanges distorted the normal price-setting mechanism in the spot advertising process and harmed the competitive process. The Division obtained a settlement agreement from the parties that prohibits the sharing of such competitively sensitive information.

As announced in July, the Department of Justice has opened a broad inquiry into competition involving digital platforms. We are reviewing whether and how market-leading online platforms have achieved market power and whether they have been engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers. We are considering the widespread concerns that consumers, businesses, and entrepreneurs have expressed about search, social media, and some retail services online. We are making this review a priority of the Division, and we are proceeding in an objective and fair-minded manner and will wait to see where the evidence leads before reaching a decision on next steps. Depending on the nature of any antitrust concerns that the evidence may present, we could look to both law enforcement and policy options as solutions. We have been meeting with consumers, competitors and other participants in the digital markets to learn from their perspectives, and we welcome further input from not only those market stakeholders, but also from members of Congress, particularly this Subcommittee. While I cannot comment on the existence or progress of any specific investigations, I can assure the Subcommittee that the Division is working hard and expeditiously on this important issue to reach the right outcome under the law. Based on our expertise and our especially talented attorneys and economists, including our investigations of various matters in the digital economy and the evolving media and communications landscape over the past two decades, the Antitrust Division is well positioned to conduct this review.

Historic Decrees and Judgments

When I addressed this Committee last fall, I spoke to you about the start of our Judgment Termination Initiative. Those efforts are now moving at full pace, and we have made great progress in eliminating legacy judgments that clog court dockets, burden defendants, and no longer serve to protect competition. Our review of over a thousand such "legacy" judgments

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[25] Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Five Additional Broadcast Television Companies, Including One National Sales Representative Firm, In Ongoing Information Sharing Investigation (June 17, 2019), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-five-additional-broadcast-television-companies-0.

[26] Press Release, U.S. Dep't of Justice, Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain from Unlawful Sharing of Competitively Sensitive Information (Nov. 13, 2018), https://www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful; Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement With Nexstar Media Group Inc. in Ongoing Television Broadcaster Information Exchange Investigation (Dec. 13, 2018), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-nexstar-media-group-inc-ongoing-television-broadcaster.

considers changes in conditions since their entry to determine whether these decrees are necessary to protect competition and consumers or, in some cases, if they are affirmatively harmful to competition. We have posted for public comment judgments proposed for termination in nearly 80 district courts throughout the country and have already been granted hundreds of terminations in over 70 district courts from Alaska to the Virgin Islands. For instance, we obtained termination of a 93-year old judgment that prohibited defendants from activities related to the sale of amusement park tickets here in Washington, D.C.; this summer, a Chicago federal court terminated dozens of decades-old judgments, including several relating to telegraphs, phonographs, and railroad strikes.

Relatedly, we have been reviewing the Paramount Consent Decrees, which for over seventy years have regulated how certain movie studios distribute films to movie theatres. As part of our review, we received more than 75 public comments[27] from members of the motion picture industry and the antitrust community. These comments will better inform our analysis of the continued effectiveness of the Paramount Decrees.

Nearly 80 years ago, the Division entered into consent agreements with The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers. The ASCAP decree was last amended in 2001, and the BMI decree in 1994 –a surprisingly long time ago when we think about how dramatically the music industry has changed in recent years. In light of this history, the Division recently opened a new review of both consent decrees,[28] and the public comment period ended on August 9. We received over 800 comments. The Division is reviewing those comments and continues to discuss the relevant issues with key stakeholders in the matter and will consider all information when determining whether to keep, modify, sunset, or terminate those decrees.

Competition Advocacy and Policy

In addition to our direct enforcement efforts, the Division has implemented a wide range of initiatives designed to advance competition both nationally and internationally. Although our policy and advocacy efforts do not always draw the same interest from outside observers as our enforcement cases, often they are just as essential in protecting American consumers and businesses. Let me describe a few of them.

Appellate: Amicus Initiative

While the vast majority of the Division's resources are devoted to directly enforcing the antitrust laws, the amicus program is a valued complement to enforcement. Private litigation is an important aspect of the antitrust regime that Congress created, and in particular its treble damage provision provides an additional tool to deter anticompetitive acts. The Division's

[27] *Paramount Consent Decree Review Public Comments 2018*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018.
[28] Press Release, U.S. Dep't of Justice, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees.

involvement in these cases, however, is important in providing guidance to the courts, to ensure they reach sound interpretations of the antitrust laws – which apply in both private and government cases – enabling effective and appropriate enforcement.

Through amicus filings, the Division is able to address developments in the case law earlier and more frequently, offering us the opportunity to have an outsized impact with our resources. The Division weighs in not out of a desire to support any particular party, but rather with an eye to assisting courts in interpreting and applying the antitrust laws according to up-to-date economic principles, thereby ensuring that robust competition can flourish throughout the U.S. economy.

In FY 2018, the Division filed five statements of interest in the district courts and eight amicus briefs in the U.S. Supreme Court and lower appeals courts in cases where the United States is not a party, as compared to just three such amicus briefs and no statements of interest in FY 2017. So far in FY 2019, the Division has filed eight statements of interest and nine amicus briefs.

These briefs touch on diverse aspects of U.S. antitrust law and related doctrines. To illustrate, the Division has weighed in three times this fiscal year through statements of interest on the topic of no-poach agreements, whereby firms agree not to poach one another's employees. The Division articulated the general rule to courts in the Western District of Pennsylvania[29] and the Middle District of North Carolina[30] that such agreements are per se unlawful unless they are ancillary to a separate legitimate transaction or collaboration. To the Eastern District of Washington, the Division explained that franchisor-franchisee businesses relationships are often legitimate collaborations with both vertical and horizontal elements and accordingly a no-poach agreement may need to be reviewed under the rule of reason to determine whether it is anticompetitive.[31] Consistent with the Division's position, this summer the Western District of Pennsylvania court adopted the per se rule for naked no poach allegations at the pleading stage in *In re Railway Industry Employee No-Poach Antitrust Litigation*.[32]

As another example of the doctrines addressed by these filings, the Division urged the Seventh Circuit in *Viamedia v. Comcast* to adopt the "no economic sense" test for unilateral

[29] Statement of Interest of the United States, In Re: Railway Industry Employee No-Poach Antitrust Litigation, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019), https://www.justice.gov/atr/case-document/file/1131056/download.
[30] Statement of Interest of the United States, Seaman v. Duke University, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019), https://www.justice.gov/atr/case-document/file/1141756/download (also arguing that the state action doctrine does not apply).
[31] Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, No. 2:18-cv-244 (E.D. Wash. Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141731/download.
[32] In Re: Railway Industry Employee No-Poach Antitrust Litigation, No. 2:18-mc-00798-JFC, 2019 U.S. Dist. LEXIS 102906 (W.D. Pa. June 20, 2019).

refusal to deal claims under Section 2.[33] In May, the Division filed a brief[34] in *Mountain Crest v. Anheuser-Busch InBev & Molson Coors*, also being heard by the Seventh Circuit. In September, the Circuit issued a decision thanking the Division for its comments and adopting the Division's views that Mountain Crest's claims went beyond the Ontario, Canada government's restrictions not to sell beer in packages with more than six containers, and therefore were not entirely exempted from Sherman Act scrutiny by the act of state doctrine.[35]

Competition Advocacy with the States

The Division has a long history offering a competition perspective on the effects of state legislation or regulation to state government officials upon request. Often in the form of an advocacy letter, the Division generally "promote[s] reliance on competition rather than on regulation where appropriate and to ensure that where regulation is appropriate, it is aligned as much as possible with competition principles."[36]

During the current fiscal year, the Division has submitted five such letters either independently or jointly with the FTC. Each letter builds on prior advocacy and enforcement efforts by one or both agencies. In one letter, the Division discouraged Texas from restricting which entities are permitted to develop facilities for the transmission of electricity in Texas.[37] In two joint letters, the Division and FTC staff encouraged Alaska[38] and Tennessee[39] to consider our longstanding guidance on curtailing or repealing certificate-of-need laws that may suppress healthcare competition. In another joint DOJ-FTC letter, the agencies encouraged Nebraska to consider our past guidance on removing unnecessary restrictions on the distribution method automobile manufacturers choose to bring their vehicles to market for consumers.[40] In another letter from October, the Department encouraged Virginia to consider the Department's prior advocacy for ways to facilitate competition by legitimate certifying bodies, while also allowing hospitals and insurers independently to decide and compete on whether to consider a physician's

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[33] Brief for the United States as Amicus Curiae in Support of Neither Party, Viamedia Inc. v. Comcast Corp., No. 18-2852 (7th Cir. Nov. 8, 2018), https://www.justice.gov/atr/case-document/file/1110056/download.

[34] Brief for the United States as Amicus Curiae in Support of Neither Party, Mountain Crest, LLC v. Anheuser-Busch InBev SA/NV, No. 18-2327 (7th Cir. May 8, 2019), https://www.justice.gov/atr/case-document/file/1161171/download.

[35] *Mountain Crest, LLC v. Anheuser-Busch InBev SA/NV*, No. 18-2327, 2019 U.S. App. LEXIS 26840 (7th Cir. Sept. 5, 2019).

[36] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, ch. 5 (5th ed. 2018), https://www.justice.gov/atr/file/761151/download.

[37] Letter from Daniel E. Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Div., U.S. Dep't of Justice to Rep. Travis Clardy, Tex. House of Reps. (April 19, 2019), https://www.justice.gov/atr/page/file/1155881/download.

[38] Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Division, and Bilal Sayed, Director, Office of Pol'y Planning, Fed'l Trade Comm'n, to Sen. David Wilson, Alaska State S. (Mar. 11, 2019), https://www.justice.gov/atr/page/file/1146346/download.

[39] Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Division, and Bilal Sayed, Director, Office of Pol'y Planning, Fed'l Trade Comm'n, to Rep. Martin Daniel, Tenn. House of Reps. (Mar. 7, 2019), https://www.justice.gov/atr/page/file/1146241/download.

[40] Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Division, and Bilal Sayed, Director, Office of Pol'y Planning, Fed'l Trade Comm'n, to Sens. Tony Vargas and Brett Lindstrom, Neb. State S. (Mar. 14, 2019), https://www.justice.gov/atr/page/file/1146236/download.

Maintenance of Care status when making business decisions.[41] In each of these letters, the Division seeks to bring a competition perspective to the state's policy discourse that might not otherwise be fully heard and that might encourage more pro-consumer policies.

Thought Leadership

Through workshops and roundtables, the Division provides a forum for industry participants, academics, consumer advocates, and other interested parties to discuss important developments in particular business sectors, the appropriate scope of various legal doctrines, or recent advancements in our understanding of relevant economic principles.

The Division hosted a workshop in September to discuss the role of antitrust labor markets in promoting robust competition for the American worker. The workshop explored the practical considerations that antitrust enforcers and private litigants face in bringing cases that involve labor markets, including approaches to defining labor markets, labor restraints arising out of competitor collaborations, and statutory and non-statutory antitrust exemptions for labor union activities. This workshop highlighted the Division's commitment to protecting workers through addressing competition issues in our society's evolving labor markets.

The Division held two other important events this past spring. In April, the Division held a public roundtable to discuss the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which reduces the civil damages exposure of a company granted leniency under the Antitrust Division's Leniency Policy if the company provides civil plaintiffs with timely, satisfactory cooperation.[42] The roundtable provided a public forum for the Division to engage with the antitrust community and gain insights from judges, attorneys, academics, the business community, and other interested stakeholders on the topic of ACPERA. The Division also received written comments from members of the public on the efficacy of ACPERA.

In early May, the Division held a public workshop to explore industry dynamics in media advertising and the implications for antitrust enforcement and policy, including merger enforcement.[43] The workshop covered different types of television and online advertising, and highlighted, among other develops in the industry, the role of online and mobile advertising networks. Panelists discussed a range of topics, including the economics of advertising, developments in advertising technologies, and the competitive dynamics of media advertising in light of the rise of digital advertising. The Division is working on its analysis of the workshop and anticipates issuing a report summarizing key information discussed at the hearings, as well as public comments, later this year.

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[41] Letter from David Lawrence, Chief, Competition Pol'y & Advocacy Section, Antitrust Division, to Hon. Sam Rasoul, Vir. House of Delegates (Oct. 22, 2019), https://www.justice.gov/atr/page/file/1212231/download.

[42] Roundtable on Antitrust Criminal Penalty Amendment and Reform Act (ACPERA), ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/events/public-roundtable-antitrust-criminal-penalty-enhancement-reform-act-acpera (last updated June 10, 2019).

[43] Public Workshop on Competition in Television and Advertising, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/public-workshop-competition-television-and-digital-advertising (last updated June 26, 2019).

The Division derives important lessons from our engagement with experts and thought leaders, including through these workshops, complementing the expertise we develop through investigations and enforcement. In recent remarks, I highlighted one such lesson: in markets with zero-cost products, the antitrust laws still protect competition and consumers because the antitrust laws protect both the price and non-price components of competition.[44]

For digital markets in particular, where consumers often pay nothing, price effects alone do not provide a complete picture of market dynamics. Harms to innovation and quality are also important dimensions of competition that can have far reaching effects. Privacy, for example can be an important dimension of quality, and so by protecting competition, we can have an impact on privacy and data protection. The Division has the legal tools to address such concerns and is up to the task of ensuring that our technology markets are competitive and provide the highest quality, most innovative, and most affordable products for American consumers.

Staff Education & Enrichment

Whether in our enforcement or policy efforts, I am a firm believer that key to our success is maintaining a talented and devoted staff. The Division must continue to attract and retain bright, talented, and passionate individuals—whether they be attorneys, economists, paralegals, or support staff.

One way we will draw talent is through the recently established James F. Rill Fellowship Program.[45] The Fellowship is designed to provide elite candidates of the Honors Program with a special opportunity to participate in antitrust enforcement actions and in the development and implementation of antitrust policy. Our inaugural Rill fellow recently began at the Division.

As I told the Subcommittee last December, the Division also recently established the Jackson-Nash Addresses, a lecture series to inspire and educate Division staff and the public about cutting-edge issues and developments in the field.[46] The most recent Jackson-Nash Address given by the Nobel Prize winning economist Paul Romer provided valuable insights into innovation, competition, and possible threats facing the modern digital economy.

We also have recently launched a rotation program, which provides the opportunity for Division attorneys to spend a one-year detail in the Appellate, Competition Policy & Advocacy, and International sections as a means to broaden their expertise and experience as well as help balance Division needs and resources. Six Division attorneys will be on detail in the first year of this program.

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[44] Makan Delrahim, Assistant Att'y General, Antitrust Div., U.S. Dep't of Justice, "...AND Justice for All": Antitrust Enforcement and Digital Gatekeepers, Remarks as Prepared for the Antitrust New Frontiers Conference (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers.

[45] *The James F. Rill Fellowship*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/oarm/james-f-rill-fellowship (last updated May 22, 2019).

[46] Press Release, U.S. Dep't of Justice, Antitrust Division Establishes the "Jackson-Nash Address" and Announces Professor Alvin Roth as Inaugural Speaker (Feb. 8, 2018), https://www.justice.gov/opa/pr/antitrust-division-establishes-jackson-nash-address-and-announces-professor-alvin-roth.

International

International engagement continues to be a top priority for the Antitrust Division. Through both case-specific cooperation and forward-thinking policy initiatives, the Division's International Program has spent the past year working with enforcers from around the world to encourage effective competition law development and enforcement. The Division's investigative teams continued to cooperate closely with their international counterparts. In FY 2019, the Division cooperated with 11 international counterparts on 20 different merger matters. For civil non-merger matters, the Division cooperated with 4 international counterparts on 5 different matters. On the criminal side, Division staff collaborated with at least 18 jurisdictions on cross-border investigations and global cartel enforcement.

When I spoke to this Committee last December, I described for you the proposal we introduced last June, the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP), part of our partnership with leading antitrust agencies around the world to develop a core set of norms which would establish fundamental due process principles with meaningful review mechanisms. With the proliferation of antitrust agencies around the world, American businesses have faced antitrust reviews that are conducted pursuant to varying standards and processes in the areas of attorney client privilege to transparency to confidentiality to non-discrimination, among others. I am pleased to report that our proposal has become a reality. At the request of several partner agencies, we implemented the framework through the International Competition Network (ICN) to take advantage of existing structures and to reduce administrative burdens. In April, the ICN's Steering Group unanimously approved the framework, which has come to be known as the Framework on Competition Agency Procedures (CAP). The CAP came into effect in May with 70 founding competition agencies. Adopting the CAP is a remarkable and historic achievement for antitrust enforcement. It sends a clear signal that competition agencies across the globe—despite differences in their structures and proceedings, as well as the legal systems in which they operate—are committed to procedural fairness.

One particularly important principle in the CAP relates to attorney-client privilege. The CAP seeks to obtain participating agencies' commitment to recognize applicable privileges, including the attorney-client privilege. This is a critical procedural norm to ensure that American businesses are treated fairly by competition agencies around the world. The Division has gone to great lengths to secure proper recognition of the privilege and appropriate treatment of materials subject to it by foreign competition authorities. For example, in negotiating the United States-Mexico-Canada Agreement, the Division succeeded in adding a clause recognizing the privilege. The U.S. Trade Representative has also included it in the negotiating objectives for competition policy chapters for future trade agreements.

Over the past year, the Division has continued to maintain and expand its relationships with competition agencies around the globe. During FY 2018, we participated in over 60 meetings with fellow enforcement agencies at home and abroad. We participated in the ICN's workshops focused on key enforcement areas, including cartels, unilateral conduct, mergers and advocacy. We also were a part of the OECD's biannual Competition Committee meetings,

during which we discussed the digital economy, competition issues relating to intellectual property licensing, labor, education and fintech markets, and legal privilege and judicial review in antitrust proceedings, among other topics. We also continue to provide technical assistance to other enforcement agencies around the globe, offering programs on topics such as merger enforcement, economic investigative tools, and leniency programs.

In terms of future initiatives, the Division, with the Federal Trade Commission, will host the ICN Annual Conference in 2020. The ICN Annual Conference is the most important conference for global competition agencies and is regularly attended by a majority of ICN's 139 member-agencies. This will be the first time that the United States antitrust agencies will host the conference. We are excited to demonstrate Division's global leadership on competition policy, showcasing our multilateral efforts to promote fundamental due process through the CAP, and engage with the world on a range of other policy issues, including digital platform economy, cartel enforcement, and merger policy.

Conclusion

Having had the honor of serving as the AAG of the Antitrust Division for over two years, I continue to find the experience deeply rewarding. I am enormously grateful to work collaboratively with this Committee, and alongside the dedicated women and men of the Antitrust Division, as we protect American consumers. I am proud of the work we have done, but I recognize that we still have a lot more to do to ensure that Americans continue to benefit from a competitive economy. We will continue to leverage our limited resources to the fullest in order to meet the coming challenges, knowing the importance of our work in every American's life.

Mr. Chairman, thank you for the opportunity to testify here today. I look forward to further discussion of these issues.

Mr. CICILLINE. Thank you, Mr. Delrahim.

Before we begin the questioning, I recognize the ranking member of the full committee, Mr. Collins, for his opening statement.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

And thanks for being here. This is, again, one of the bright spots, and I appreciate the chairman and ranking member on our side, and also the full committee chairman, that we can continue this. This is something that's needed to be done and, Mr. Delrahim and others, I thank you for being here.

This antitrust investigation is continuing to be one of the bright spots on this committee's agenda this term, and the importance of digital technology in our constituents' lives grows every day. The tech sector is one of the greatest forces for innovation and wealth creation in the world and our economy. Rarely in history have we witnessed such a transformative change in how we go about our lives.

Much of that change is very much for the good, but not all. Among these changes are the ways that companies compete, both fairly and unfairly, to provide goods and services to consumers. It is, therefore, critical that we work on a bipartisan basis to understand whether our current antitrust laws or our antitrust enforcement agencies are able to keep up with the task of the tech sector in the present time. We will have accomplished something important together if we can determine whether our antitrust laws need updating for the digital economy or whether the antitrust agencies need Congress' help to assure vigorous antitrust enforcement in the tech sector.

From the start of our inquiry, I made it clear that overarching principles are guiding me in this inquiry.

First, while some tech companies have become very big, and big is not necessarily bad, companies that offer new innovations, better solutions, and more consumer benefit at lower prices often become big, and they benefit society. Proposals to break up big companies just because they are big risk throwing out the baby with the bathwater and are simply punishing success.

Second, just like existing antitrust laws, proposals for new legislation should aim to keep the free market free. Proposals to construct broad new regulatory regimes should be viewed with caution. Experience shows that regulatory solutions often miss the mark, solve problems less efficiently than free markets, and can create new opportunities for anticompetitive companies to suppress competition through rent seeking. That is especially true when the regulations attempt to take on evolving problems in fast-moving markets.

The principle is particularly important to me as we seek a better way to protect privacy of consumers' online data. I announced in July of this year that I would be introducing legislation this term to achieve better protection, and I'm working hard on that legislation, and it is strongly animated by the principles that I have just laid out.

Other proposals, like laws adopted in Europe and California, threaten to entrench the market power of large incumbent tech companies under the cloak of protecting online data privacy. I want us to instead enact new Federal law that better protects privacy

without making it harder for new and small innovative companies to enter the market, jostle with the giants, and strive to become the blockbuster companies of tomorrow. We've got to keep that pipeline open.

The heads of the antitrust agencies before us today also have stated principles they believe should guide antitrust inquiries into the tech sector, and I'm looking forward again to hearing your thoughts. We have talked many times before about this, and I appreciate that as we go forward.

Again, this is what we need to be doing, and I think we have had long conversations in this arena, and I believe that the disruptors in our economy, many of these in the tech sector, have brought forth many, many good things.

But I think we're also dealing in an new age and a new environment, and this is a good look forward. Where are we right now?

Mr. Delrahim, we've talked many times about many things, and especially through music last year. Again, I appreciate your concern there. I still reiterate I'm looking forward as we move forward on consent decrees and others that that is not something that can be done without a lot of discussion and talk as we move forward. So I do appreciate that. And thanks for being here.

And again, Mr. Chairman, this is really a good time, and I appreciate your continued interest in this, and yield back.

Mr. CICILLINE. Thank you, Mr. Collins.

We will now proceed under the 5-minute rule. I recognize the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

And thank you, Mr. Delrahim and Mr. Simons, for coming today to testify.

The concentration of power in the digital marketplace is something that should concern every American, and your agencies are on the front line in addressing unlawful uses of market dominance. Digital companies are acquiring their competitors at an alarming rate. Few, if any, platforms are truly interoperable, and the collection of and capitalization on user data has reached unprecedented heights.

I'm also concerned that barriers to bringing antitrust cases have grown too high for the average American. Since the 1980s, case law has snowballed to create evidentiary standards that prevent harmed individuals from commencing meritorious suits with any hope of success.

I'm looking forward to talking with you all today about the manipulation of market power through data and the FTC's efforts to enforce our laws.

Mr. Delrahim, a year ago you argued in a speech that, quote, "data, even large amounts of it, may not act as an entry barrier in every digital market," end quote. Specifically, you said, quote, "while there has been a temptation to use data as a proxy for price when determining the anticompetitive effects of a merger or conduct," end quote, that the value of consumer data, quote, "should not be confused with price."

But just last week in a speech at Harvard Law School, you indicated that large amounts of data can entrench dominant players in digital markets and cuts out emerging competitors. You said that

data is, quote, "analogous to a new currency," end quote, and that antitrust enforcers need to be vigilant about the collection, aggregation, and commercial use of consumer data, end quote.

Has your view on the role of data in the digital marketplace changed since your speech last year?

Mr. DELRAHIM. Mr. Johnson, thanks for the question. I think both of those statements, I stand by them. I think, one——

Mr. JOHNSON. They tend to be inconsistent.

Mr. DELRAHIM. Well, let me explain. Let me explain. I don't think that you can directly correlate data with a particular price, partly because data has multiple dimensions to it.

For example, just the user data, your data or my data, could be collected by numerous people here in what we term as a nonrivalrous asset, meaning that its value does not diminish by the number of people who would have it. If I had a $10 bill, by the time I gave it to the second person, a dollar to the second person, it would be only worth $8.

However, usage data is different, and that's something we're trying to grapple with looking at that. By that, I mean your data from 2015 to 2017, your viewing habits, your purchases is not something that could be replicated by a new entrant who could start in 2019.

So your usage data has a completely different value, it is much more unique than your user data, so we have to be careful about what kind of data and how we look at it, which is why this, what you guys are doing in the oversight, is so critical, and what we continue to do to learn in this industry, the competitive impact of data, is so important.

Mr. JOHNSON. Thank you.

Do you believe that antitrust enforcers' past reluctance to view concentrated control over data as an entry barrier has been a mistake?

Mr. DELRAHIM. You know, I think it would be unfair for me to critique my predecessors' involvement of these. Every single transaction has different dimensions, and, frankly, our understanding of the marketplace. This is a fast-evolving market, and I think what the agencies know today may not be what they knew 10 years ago.

Mr. JOHNSON. Let me ask you this as my time is running out.

Mr. DELRAHIM. Sure.

Mr. JOHNSON. Do you believe that the FTC, Mr. Simons, do you believe that the FTC has an overbearance on a policy that indicates to me that you feel like the risk of litigation is something that is a primary consideration in deciding whether or not to file a complaint in the case of a merger or in anticompetitive conduct?

Mr. CICILLINE. The gentleman's time has expired.

Mr. SIMONS. So we find ourselves in a situation where we're resource constrained. So when you live in that kind of environment, you want to be careful about the complaints you do file. You don't want to file—— you want to focus on the ones that have a better chance of success and also the ones that have the most impact.

So in that sense, we are concerned about litigation risk, and if we had more resources, we could bring more cases.

Mr. JOHNSON. Thank you.

I yield back.

Mr. CICILLINE. I now recognize the ranking member of the subcommittee, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

Last week I was in Berlin and Brussels talking about privacy, talking about competition, expressing my fear that the Europeans, led by the Germans, are attempting to use their laws on this as a way of, number one, forcing us to adopt their laws rather than enforcing ours; and secondly, being used very subtly as a protectionist mechanism for European data platforms.

Let me start out by saying that basically U.S. antitrust law was designed to protect consumers. European antitrust law is designed to protect the competition. I cast my vote with the consumers, and I think that 100 years ago our predecessors in Congress got it right. We have to improve and reform both our enforcement in an increasingly globalized economy as well as dealing with the policy differences that the United States and our foreign competitors have had.

Let me say that I have expressed repeatedly that Europe's General Data Protection Regulation, or GDPR, has been designed to squeeze out competitors and help entrench large incumbents, and it has enervated innovation.

Are either of your agencies looking at that, particularly leading up to this international conference that will be held here next May?

Mr. SIMONS. So we're very focused on the privacy issue, and in particular we've encouraged Congress to consider and adopt Federal privacy legislation.

But one of the things we're very focused on and concerned about in that effort is the issues that you've just raised with respect to GDPR in Europe. We're very concerned that adopting a program like that could end up doing exactly the opposite of what we're trying to do with our competition mission, which is to entrench the large dominant platforms at the expense of the smaller competitors and the new entrants.

By requiring opt-in consent on such a widespread basis, you put the consumer in a situation where the consumer is probably only likely to consent—confine that opt-in consent to so many competitors in the marketplace, and of course, the dominant ones would be the most likely to be able to get the consent.

And also they're consumer facing. So, for example, data brokers who aren't consumer facing would have a difficult time potentially getting that kind of opt-in consent and competing in the marketplace. And those are the folks that are providing, I think, at least in our country, data to new entrants and to smaller competitors as a kind of a substitute for what Google and Facebook collect.

Mr. SENSENBRENNER. Well, you know, let me express my concern that if the Europeans turn that screw too tightly, it's going to have a very bad impact on transatlantic commerce, which will end up having a result of a recession or worse on both sides of the Atlantic.

Now, I don't think from what I heard in Europe last week that they really have considered that very much. More importantly, they really don't care as long as the European platforms get a leg up on the American platforms.

So when we're dealing with these issues, I think we have to be very, very careful that the unintended consequence of what we're doing is not to end up encouraging protectionist policies on the part of our foreign competitors in the name of, quote, antitrust enforcement, or, quote, privacy protection.

You know, I agree with you, we need to have a Federal privacy law, which would make my arguments in Europe a lot more persuasive, I would say, but at the same time we've got to be very careful not only in what we want to accomplish, but making sure that it's limited to what we want to accomplish rather than having a lot of unintended consequences which hurt consumers on both sides of the Atlantic.

And with that statement, I yield back.

Mr. CICILLINE. I thank the gentleman.

I now recognize the distinguished gentlelady from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chairman.

And thank you both for being here.

I wanted to start in a slightly different direction, and I'll direct these questions to you, Assistant Attorney General Delrahim, and that is to discuss no-poach agreements, which are, as you know, agreements that employers make with each other in which they agree not to recruit each other's employees. And these agreements have been found to inhibit competition among employers, which, in turn, harms workers.

The FTC and the DOJ's joint guidance states that competition among employers for employees, quote, "helps actual and potential employees through higher wages, better benefits, and terms of employment."

Three years ago, the Department of Justice's Antitrust Division took a formal public instance that no-poach clauses are, per se, illegal, correct?

Mr. DELRAHIM. Correct.

Ms. JAYAPAL. And that joint FTC–DOJ guidance explicitly states from an antitrust perspective, and this is a quote, firms that——

Mr. DELRAHIM. Let me just clarify.

Ms. JAYAPAL. Yeah.

Mr. DELRAHIM. What we call naked no-poach. These are horizontal no-poach agreements. So there could be some variations to that. And these are vertical arrangements. Sometimes we see those in the franchise systems.

Ms. JAYAPAL. Well, I am going to that. And the joint FTC–DOJ guidance explicitly states from an antitrust perspective firms that compete to hire or retain employees are competitors in the employment marketplace regardless of—and this speaks to what you were just saying—whether the firms make the same products or compete to provide the same services, which seems extremely clear.

But I've been a bit concerned that the DOJ recently has started to wobble away from that very clear position. And your Department actually actively argued in favor of more lax standards for franchise employers that use no-poach agreements.

And I'm specifically going to refer you to a brief that your Department filed in Stigar v. Dough Dough in the Eastern District of my State, Washington State, arguing that franchise companies

should be held to a different standard than other kinds of employers when they use no-poach agreements. Is that what you were arguing?

Mr. DELRAHIM. We were arguing based on the law, and I'm happy to explain. Ultimately, we want to protect competition and the worker, and I'm happy to explain our reasoning for that.

We argued in multiple cases, including the Duke-North Carolina, where we took an unprecedented step, for the per se treatment of that when the defendants, not only were they arguing for rule of reason treatment, but also seeking State action immunity. So we did that. Not only did we argue, but we intervened in that.

In the franchise matters, we argued not so much that they're per se illegal, but that the rule of reason should apply when it's inside that system. And the reason for that is—some of you may know my background. I worked in my father's gas station for 8 years.

Ms. JAYAPAL. Let me just, just because I have very little time, let me just——

Mr. DELRAHIM. But this is really important for the workers that you're concerned about as we are.

Ms. JAYAPAL. Right. And here is my question, I guess, is why the Department would choose to use this discretion that you have in situations, and in fact to the point where our attorney general in my home State of Washington actually had to submit a brief where they again explicitly clarified that no-poach agreements were per se illegal and that the distinction that you were making or that your Department was making was not consistent with past positions.

The American Antitrust Institute actually wrote a paper directly disagreeing with your Department's stance on this issue.

And so I guess the question I have is, when the agency is supposed to protect workers, and I believe that that's what you have been trying to do, from the harms of anticompetitive corporate behavior, why expend significant energy and precious resources in filing these briefs that allow large franchising corporate chains to get away with using no-poach agreements under, I would argue, under pretty flimsy justifications, having read some of the documents in this case?

Because at the core of this is the fact that millions of workers are affected when employers make these agreements that undermine competition, and they, and we, I am really hoping that your agency intervenes on behalf of these workers.

I want to give you just 5 seconds.

And then I do have a question for Mr. Simons, if you want to say anything, very brief.

Mr. DELRAHIM. Well, if I could ask the chairman, this requires more than a 5-second response, and I do not want to leave your constituents and this committee with the wrong impression that somehow that there's a distinction.

I would like to explain—this stuff is, you know, it's complicated—but why it actually—our position actually benefits the exact worker that you are concerned about and the attorney general of Washington is concerned about—that's not what the case law is—and how our arguments actually protect those workers, not the reverse.

So I'm happy to explain that. Would you like me to do that now?

Ms. JAYAPAL. My time has expired, unfortunately, but I'm happy to take any information that you have on this.

Mr. DELRAHIM. Mr. Chairman, can I just quickly explain why this is so important? Let me just give you one analogy, and this is Jiffy Lube.

So if you're a franchisor and you have a franchise system and you have the folks who would invest, let's say, $350,000 to buy a Jiffy Lube franchise, and they would like to—and they invest that. So these are hardworking people employing locals.

And if they want to train the new mechanic to do whatever they do, oil changes, the other car repairs, they need to train that and make sure that the competitor within that—the other Jiffy Lube 5 miles down the road is not going to now after 6 weeks of training and the investments that they make to train that employee and probably have paid them, that that person is going to compete.

So within reason, and we said this is why it's a rule of reason, not a per se illegality, it's important for them to have that assurance, that small business owner. Why? Because if they don't, and if the attorney general from Washington's rule is in place for those vertical restraints, what do you think will happen with that new small business owner?

What they will do is say, you know what, employee? You go train yourself before I pay you and put you on the payroll, or I won't pay to train you to come in.

This is a critical issue——

Mr. CICILLINE. I've let you go over 2 minutes.

Ms. JAYAPAL. Yeah. And, Mr. Chairman, I just want to say that I think that this is a very important issue because it is a rewrite of previous Department policy and a different direction that the Department is going in making this new distinction.

Thank you, Mr. Chairman. I yield back.

Mr. CICILLINE. I now recognize the gentleman from North Dakota, Mr. Armstrong, for 5 minutes.

Mr. ARMSTRONG. Thank you, Mr. Chairman.

Mr. Simons, you said just earlier that consumers will only do a limited amount of opt-ins, when we're talking about that. And I'm curious about that, particularly because if they're standardized like a lot of them are on a platform, I mean, I would think after you've done 10, you won't care if you do 30. So I'm just interested in the rationale behind that.

Mr. SIMONS. I mean, that's possible, but the other thing that might happen is people might not want their information spread so widely. It increases the risk of a breach.

Mr. ARMSTRONG. And I think that's an important part, and I'm actually going to disregard the privacy part when I ask these questions because that is one of—I mean, the flip side to sharing data is more people have my data.

Mr. SIMONS. Right. Exactly.

Mr. ARMSTRONG. And I think that is an area where we continue to go.

Mr. Delrahim, you gave a speech in Israel, and it discussed how not all data is alike. And I'm generally curious as to what types of data are more susceptible to being used in an anticompetitive manner. Because I think from somebody like me who doesn't——

Mr. DELRAHIM. Sure.

Mr. ARMSTRONG [continuing]. I mean, understand this, which I think is most consumers, like, data is this one all-encompassing word, but it's very different, correct?

Mr. DELRAHIM. It is. It is very different. It takes many forms. And we have to take a look at that and its actual competitive impact.

And as we look at the GDPR regime that Mr. Sensenbrenner raised, in addition to what Chairman Simon said, the other thing we look at is whether that regulatory regime actually creates barriers to new entry, is the cost of that collection, and whereas an incumbent may have already gathered certain data.

But as I mentioned to Mr. Johnson, there is user data, there's usage data, and there's different qualities and attributes for each sets of data.

Mr. ARMSTRONG. And then I'm going to actually let you continue talking about the Washington versus—the franchise deal because, I mean, in a completely different sector, this is something we saw happen an incredible amount in North Dakota, which when our economy was growing is small businesses having employees taken by larger businesses after they invest.

I mean, I think one thing that particularly with any specific skill set is the first 3 months, 6 months to a year when you're training a highly skilled employee, the investment you're putting into them from a business perspective far outweighs the return you get. So you're relying on that employment to pay off in year 2, year 3, year 4.

And I know 5 seconds wasn't enough, so I'm going to allow you some time to answer it.

Mr. DELRAHIM. The chairman was generous enough to allow me more than 5 seconds, which I did.

But I think you raised a point that I think is really important, because we have to take a look at each of these restraints. Again, not a horizontal. We argued, we filed in the Wabtec case in Pennsylvania, we filed in the Duke-North Carolina case, a number of these, where we have gone in aggressively saying that this should be per se illegal. However, when it is within the system like franchise, as I explained, the rule of reason should apply. Are these reasonable restraints?

If you're saying that you can never leave for the next 6 years once I train you, well, I think a judge could find that unreasonable. However, there's limits and there's a test that our Supreme Court has put down, and I would submit what we have submitted is well within what the laws and the precedents, legal precedents are.

Mr. ARMSTRONG. And then would you expound on how that actually protects workers?

Mr. DELRAHIM. It absolutely protects workers because it provides that small business owner the incentive to actually invest and train that employee. So the new employee who wants to enter the workforce can now get trained by that franchise owner because for those first 6 weeks that they're learning how to do a tune up or a brake you don't want them to walk across the street to the other competitor.

And so those, within reason, can be—and every case is different. Every franchise, every restraint will be—should be treated differently. They should not be banned as per se illegal all the time because some plaintiffs' class has brought that case.

Mr. ARMSTRONG. And then so that's where you mean the reasonable test comes in.

Mr. DELRAHIM. Yes. There's a set of tests in its duration and its effect, and we look at those, as do the courts. And there's a set of case law that guides the factors that go into analysis.

Mr. ARMSTRONG. And then I guess this can be for either one of you, but I'll ask Mr. Simons.

As we talk about data sharing and how this creates a competitive edge, I ignored it for 4 minutes and 30 seconds. But how do we factor that privacy concern into this conversation?

Mr. SIMONS. So you mean on the competition side?

Mr. ARMSTRONG. Well, if somebody has my data and we're requiring them to share my data, that means two people have my data.

Mr. SIMONS. Right. So there's a tradeoff. I mean, you just have to balance one against the other. And if it's voluntary in terms of who shares—you know, whether the consumer's data is shared or not, that leaves it up to the consumer.

Mr. ARMSTRONG. So you're saying voluntary on the front end.

Mr. SIMONS. Yeah. I mean——

Mr. ARMSTRONG. It has to be voluntary——

Mr. SIMONS. I mean, a consumer can make a judgment—maybe there's an issue with how informed the consumer is—but the consumer can make a judgment about, do I want to be able to port all my data from one player to another, and now my data is in two places, and did I just double the risk of my data being breached?

Mr. ARMSTRONG. Wouldn't they do that on the front end, right? I mean——

Mr. SIMONS. Yes.

Mr. ARMSTRONG. On whatever service they're getting, they're going to do it——

Mr. SIMONS. Yes.

Mr. ARMSTRONG [continuing]. That's the first question they're going to get.

Mr. SIMONS. Right.

Mr. ARMSTRONG. Thank you.

Mr. CICILLINE. I now recognize the gentleman from Colorado, Mr. Neguse, for 5 minutes.

Mr. NEGUSE. Thank you, Mr. Chairman. Thank you for your leadership in hosting this important hearing.

And thank you to both the witnesses for your testimony today.

I just want to deviate from my prepared remarks for a minute because I'm struggling to follow this last exchange between Representative Armstrong and Mr. Simons. Help me understand your argument that informed consent—that essentially providing a GDPR-type condition here in the United States, that that would somehow put at risk data privacy. I'm not——

Mr. SIMONS. And it's just something to consider. It's a factor to consider.

And so the consideration is by requiring the consumer to opt—let me give you an example. Let's suppose, and this is a little bit stylized, but let's suppose you have a situation where you've got data that's not very sensitive at all, and you have data that's very sensitive. And let's suppose also that the data that's not very sensitive is data that's very kind of useful for doing targeted advertising, okay?

And so if you had an opt-in for both of those categories, the sensitive and the nonsensitive, you might end up in a situation where a consumer is just, for whatever reason, maybe it's just inertia, they don't want to automatically give consent to every business that they come across on the internet, right.

Because a lot of—like, for example, for smaller players and for new entrants for sure, they don't have a reputation maybe that's recognizable to the average consumer. So you're immediately reluctant to——

Mr. NEGUSE. But how does that harm data privacy to the extent that a consumer decides——

Mr. SIMONS. Oh. It doesn't necessarily harm data privacy so much, but what the harm is, is to competition. Because in my stylized example, you might have a situation where you don't really have harm from the nonsensitive data being used without opt-in consent to the consumer, but you have harm to competition because the small players and the new entrants are less likely to get access to it.

Mr. NEGUSE. Has the FTC done any kind of empirical study to demonstrate whether or not the new GDPR regulations implemented in Europe have resulted in a dilution of concentration of market power of various email providers and so on and so forth?

Mr. SIMONS. It would be an increase in concentration. We haven't done any ourselves, but other people are doing analysis, and the preliminary work suggests that it's concentrating share in the dominant platforms.

Mr. NEGUSE. So if you could provide——

Mr. SIMONS. Sure. Be happy to.

Mr. NEGUSE [continuing]. The specific study that you're referring to, that would be helpful for this committee to consider, obviously.

Mr. SIMONS. There's a few of them, but it's preliminary.

Mr. NEGUSE. Well, and given that last point then, I think it would be important for us to contextually remember that since it doesn't seem as though there's finality to that just quite yet.

Mr. SIMONS. No. There's not finality.

Mr. NEGUSE. I do want to just talk briefly about the settlement with Facebook earlier this year and give you an opportunity to kind of explain the methodology that the FTC used to reach the regulatory settlement that you reached.

Obviously, as I'm sure you're aware, there are a number of us in both Chambers of the Congress who were deeply disappointed, in our view, with the terms of the settlement, a $5 billion settlement. As you know, Facebook generated about $56 billion in revenue just last year, in calendar year 2018. So by my estimates, the settlement would entail about a month's worth of revenue for Facebook.

Mr. SIMONS. Yeah, about 9 percent.

Mr. NEGUSE. About 9 percent.

Mr. SIMONS. About 23 percent of their profits.

Mr. NEGUSE. Well, yeah, in a single year. And again, there are a number of other aspects of the settlement that I'd like to get to, and my time is limited. But if you could perhaps explain the methodology as to how you reached that outcome.

Mr. SIMONS. Yeah. So, first of all, let me say that I'm very disappointed that you all are disappointed. And let me try to explain why I think what we did was a terrific outcome for consumers.

So we have—first of all, I think the settlement alone stands as very—as very aggressive and much more than anything anyone else around the world has done. They haven't even come remotely close. In fact, if you took all the enforcement actions from all the privacy authorities around the world and combined them, they wouldn't even get close. So that's one.

Two, even if we wanted to do more, we don't have the authority to do more. We do not have the authority to impose fines or on our own increase the injunctive relief. We have to go to court.

So what we did is we negotiated long and very hard with Facebook to get the best relief we could get in a settlement and compare—then compare that to what we would have gotten if we had gone to court. It would have taken several years to go to court. We may have won, we may have lost. But even if we had won——

Mr. NEGUSE. I appreciate that. Let me reclaim my time.

Mr. SIMONS. Even if we had won, we would not have come anywhere close to what we——

Mr. NEGUSE. Sure. I'll reclaim my time. Sir, I wanted to give you a chance to be able to explain. I have limited time. And I appreciate your explanation. And what I was going to say is that ultimately one point that I think you and I both agree on is that the tools that the FTC has under existing statute, in my view, and I suspect perhaps in yours, could be strengthened.

And given the trend lines that are moving in this direction and the challenges that your agency faces in terms of dealing with these particular disputes, I would think that this committee could provide some leadership on that front. And so I look forward to having more conversations in that regard.

Mr. SIMONS. I would be thrilled to do that.

Mr. CICILLINE. And I'll just let the committee know we're going to do a second round, so you'll have some opportunity to follow up.

I now recognize myself for 5 minutes.

Chairman Simons, in a letter for today's hearing, Marc Rotenberg, the president of EPIC, states, and I quote, that it's increasingly clear that data protection, competition, and innovation are all on the same side in a healthy internet economy. The critical challenge now for the committee is to ensure that the Federal Trade Commission fulfills its mission and safeguards these interests. The current path is not sustainable.

And, Chairman Simons, how do you respond to concerns that the FTC has failed to act in response to numerous antitrust and privacy complaints over the past decade and has effectively ignored the obvious cost to personal privacy that has resulted from consolidation in the digital marketplace over this period? And do you agree that market consolidation in digital markets is coming at the expense of strong user privacy?

Mr. SIMONS. Well, first of all, I reject that argument.

Mr. CICILLINE. Which argument?

Mr. SIMONS. Well, the one you just stated from EPIC.

So first of all, on the privacy side, we have a hundred-year-old statute that was not in any way designed to anticipate the privacy issues that we face today. My predecessors at the FTC did an amazing job inventing essentially out of whole cloth a privacy regime that is the most aggressive in the world.

So I think if you want us to do more on the privacy front, then we need help from you. We've done as much as we can do with the tools we have. What I was trying to explain before was that we do not have authority even remotely approaching what GDPR has, what the California Act has as well. So if you want us to do more, you need to give us the authority.

In terms of——

Mr. CICILLINE. So I——

Mr. SIMONS. I'm sorry. Go ahead.

Mr. CICILLINE. So I take it from that, you do agree with the last statement that I made, that market consolidation in digital markets is, in fact, coming at the expense of strong user privacy. You're just suggesting you need some additional tools to respond to that.

Mr. SIMONS. Well, what I've said before is that the privacy issue was a critical issue to the U.S., to our country, and it involves very significant social and societal values. And in order to do privacy the right way, it has to be done with those values in mind, and you need—that needs to be——

Mr. CICILLINE. My question was a simple one. You are seeing in your work that, in fact, user privacy has been harmed as a result of this market consolidation in the digital marketplace. You just said that part of the reason is, if we want you to do more to protect user privacy, you need additional tools.

Mr. SIMONS. Right.

Mr. CICILLINE. So I take it that's made on some observations you're making about the marketplace.

Mr. SIMONS. Well, we have ongoing investigations involved in the digital marketplace, and so that's under study. I mean, not study, they're under investigation. It's not a study.

Mr. CICILLINE. Thank you.

Mr. Delrahim, in a speech that was referenced that you gave on Friday you quote Professor Shoshana Zuboff, who I've had the opportunity to meet with, and you say, in speaking of her research and her recent book, you say that she has termed the commercialization of predicting human behavior and the accompanying encroachment on privacy as a form of surveillance capitalism or the unilateral claiming of private human experience as free raw material for translation into behavioral data.

And so as we consider ways to protect America's privacy, particularly in light of how these protections may reinforce market power, shouldn't we think about addressing this underlying business model on behavioral advertising?

I mean, some have suggested we should ban it completely. Some folks, like Roger McNamee, have recently made statements about sort of recognizing the control of your data as a human right. And isn't that sort of the underlying problem that we have to address

in some way in our responding to the work of Professor Zuboff and this behavioral data collection?

Mr. DELRAHIM. Well, Mr. Chairman, you know, that's an important issue. That's a big public policy debate outside of antitrust. As I've explained, privacy and data protection could be a quality element for the purposes of antitrust, and if you have competition between different platforms, then you could compete on some of those avenues, particularly where there's a revealed preference by the user that they value privacy, and I think more and more consumers do.

As for a broader debate of whether or not we should, you know, ban that type of marketplace, as Professor Zuboff advocates, or place some limits or at least some disclosures, I think that's a debate for this body to have. I just enforce the laws that you write.

Mr. CICILLINE. But do you view that there is, in the consideration of competition and the effectiveness of the market, whether there's competition, that the impact on privacy is a factor? I think you already said that.

Mr. DELRAHIM. Absolutely.

Mr. CICILLINE. How do you think that about that issue in your competition enforcement work?

Mr. DELRAHIM. Well, we look at it, and there is—you know, what I'm happy about, with respect to some of this public discussion about antitrust, is there's this misconception that somehow, you know, the standards by which we enforce the laws is limited to price effects or just quantity effects, and it's not. The courts have repeatedly said quality, innovation, choice are elements of this, of antitrust, and the consumer welfare standard. It's just that I think we have to hone our skills, as well as familiarize the judges more with it because we haven't had many cases on those, certainly not as many as we readily prove with price effects. So I think we have to take a look and describe these types of harms as the Division has done in other cases.

Mr. CICILLINE. Thank you. My time is expired.

I now recognize Mr. Armstrong, the gentleman from South Dakota, for 5 minutes.

Mr. ARMSTRONG. Still North Dakota.

Mr. CICILLINE. Still North Dakota.

Mr. ARMSTRONG. There's been suggestions that companies with large data repositories be forced to share that data with smaller competitors, especially since data is nonrivalrous. That seems, to me, like an extreme intervention from the government. I'm going to just start with, do those proposals concern you?

Mr. SIMONS. Yeah. So it's nonrivalrous in the sense that you can duplicate it without diminishing the other—you know, the initial copy. The problem is it may be expensive and costly to produce the data set in the first place. So one example of that that we've had in our enforcement involves title plants. So it's all publicly available, right, because that's where—you know, the title plants are collecting title information and they're getting it from public sources either online or they go to the courthouse and have to get it.

So it's expensive, though, to create that title plant in the first place. And if you made the person who creates the title plant in

the first place duplicate it for free, then what's the incentive to create it in the first place?

Mr. ARMSTRONG. Do you——

Mr. DELRAHIM. I agree with that. You know, look, that's not to say that somehow the laws would not allow us to force that. We have a high burden to meet, should we want to force data sharing, but I agree with Chairman Simons that we should be very wary about doing that. Now, if there's a merger and you have two data sets, and we look at those as assets, and there's an overlap where they would have too much data, then that's one where we could say, you must sell this off—one of the sets off before we allow the merger to go through.

But as far as a company who has invested and gathered that data through investment and hard work, we should be, you know, very careful to not force that sharing upon them as the Supreme Court has warned us in the past.

Mr. ARMSTRONG. And again, I'm just prefacing this, that this is not even discussing the privacy part of that conversation, which is a whole different issue. And I think that's important in that when we talk about this, we always have to make sure that—again, that privacy is part of that conversation. Because forcing somebody to sell their data or share their data is running into that as well.

Mr. DELRAHIM. Unless they acquired it illegally, and that's a whole different story.

Mr. ARMSTRONG. Well, then we're talking criminal law, and then I can actually probably sound fairly smart about it.

So when dealing with artificial intelligence and machine learning often the benefits of innovation, an increase with larger data sets, that provides a benefit to consumers in a lot of instances, and we're going to continue to go down this road. How do we approach large collection of data in the sense that it harms consumers or is used anticompetitively but also in certain circumstances can benefit consumers?

Mr. DELRAHIM. Mr. Chairman?

Mr. SIMONS. So I think it's very fact-specific. It depends on the circumstances, and you have to weigh one against the other.

Mr. ARMSTRONG. Which gets into our problem, is if you get to be so fact-specific that it's a little difficult for us to—I mean, we have to give you guys the tools—I agree with Mr. Neguse when he left—but also at the same time, at some point in time, we have to draw some kind of bright line laws. I mean, that's regardless of where you're at in any situation. At some point in time, we have to find some area where the regulation hits a certain point.

Mr. SIMONS. Well, our whole statute and the whole statutory regime is based on reasonableness. And so reasonableness means fact-dependent.

Mr. DELRAHIM. Well, you look at the effects and you look at the harms. I think that's what we—you know, in balancing that, at least for competition. That's not to say that should you come up with some kind of a regime that affects that. But we should be very careful because there are some—lots of consumer benefits, lots of efficiencies, lots of transactions.

We just had our trilateral meeting in Ottawa just a few weeks ago, where, you know, the Canadian enforcement officials, the

Mexican enforcement officials, Mr. Chairman and I, had the privilege of attending. And, you know, to my surprise at least, the president of the antitrust authority in Mexico said she welcomed for the first time Amazon's entry into their market. They liked that because it lowered the price to the consumers, because Walmart had such a big market share in Mexico.

So I think we have to be careful about the possible positive effect some of these technologies could have. We have to just make sure that we're eliminating the harm that they'll create.

Mr. ARMSTRONG. Well, and I agree, and I agree with the reasonableness and fact-specific, but also, at some point in time, if there isn't some guiding, I mean, roadmap, then—reasonableness is a great word because it sounds great, but reasonableness can vary significantly depending on who is hearing the case, and it's hard to continue to build a company or to start innovation if your sole basis is, well, we'll cross that bridge when we get there.

Mr. SIMONS. Yeah. So one of the things we've done in the past and we're going to do in the future is put out guidelines or commentaries that try to explain what are the things we look at, and give the, you know, the private bar and business community a better sense of what is—what is over the line versus what is not over the line.

Mr. ARMSTRONG. Thank you.

Mr. CICILLINE. Thank you. The gentleman's time is expired.

I recognize the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you.

In the digital marketplace where data is the currency and one player has developed not just a corner on the market, but is the market, and the cost of acquiring the data has long since been exceeded by the profit, by the multibillion dollar profits that have been made, how can you promote competition in that digital marketplace if allocation of data from the only market player is off the table?

Mr. SIMONS. Well, you want to make sure that they acquired their position lawfully, because if they didn't—if they didn't——

Mr. JOHNSON. It's a given that they—well, I mean, assuming that the data was acquired in a legally permissible manner.

Mr. SIMONS. If it's acquired in a legally permissible manner and it's used in a legally permissible manner, then——

Mr. JOHNSON. But would anticompetitive——

Mr. SIMONS. No. Well, if it's used for an anticompetitive purpose, then we could go after it, and we would.

Mr. JOHNSON. Okay. All right. Okay.

Mr. Simons, Facebook has repeatedly misrepresented how it uses individuals' data, and I worry whether the FTC's settlement releases Facebook for misrepresentations that the public is only now learning about. For example, TechCrunch reported in September that Facebook had publicly exposed the phone numbers of 133 million U.S. users. Assuming Facebook had not told users it would be exposing their phone numbers this way, and assuming Facebook exposed their numbers before the settlement was finalized in June, would Facebook's misconduct be released from liability under the settlement agreement?

Mr. SIMONS. It would be released under the settlement agreement to the same extent it would be released if we went to litigation and won. No difference.

Mr. JOHNSON. In August, Bloomberg reported that Facebook had paid contractors to transcribe users' audio chats. Did the FTC settlement release Facebook from liability for that conduct?

Mr. SIMONS. I'm sorry, could you repeat that? I didn't catch that.

Mr. JOHNSON. Facebook paid contractors to transcribe users' audio chats. Did the settlement release Facebook from liability for that conduct?

Mr. SIMONS. It released Facebook from order violations that occurred prior to June 12 that did not continue past June 12. It did not release Facebook from Section 5 violations that we didn't already know about.

Mr. JOHNSON. Just yesterday, CNET reported that when some users scroll through Facebook's app on their iPhones, Facebook activates users' cameras and starts watching them. Did the FTC settlement release Facebook from liability for that——

Mr. SIMONS. I can just say what I just said and also remark that it's inappropriate for me to comment on whether or not we're conducting nonpublic investigations and——

Mr. JOHNSON. Well, no, I'm just asking whether or not——

Mr. SIMONS. And that's all part—that's all part of——

Mr. JOHNSON [continuing]. That misconduct had been exempted by the settlement agreement.

Mr. SIMONS. I don't know enough to know the answer to that question because I don't know enough to know—I don't have enough facts to know.

Mr. JOHNSON. Does the FTC——

Mr. SIMONS. But let me say one thing—and I'm sorry to interrupt you—which is that you can be assured that if there's something in the press that raises a privacy issue, our staff is either already looking at it or we'll immediately start looking at it when they see the media report.

Mr. JOHNSON. Okay. But yet you need more manpower in order to be able to respond to these complaints that seem to proliferate continuously?

Mr. SIMONS. Yes. We could use more resources, definitely.

Mr. JOHNSON. Thank you.

Does the FTC list anywhere the full universe of known order violations and known Section 5 violations for which the FTC granted the release to Facebook?

Mr. SIMONS. No.

Mr. JOHNSON. You do not list those offenses?

Mr. SIMONS. I'm sorry, maybe I didn't understand your question.

Mr. JOHNSON. Yeah. Does the FTC list anywhere the full universe of known order violations and known Section 5 violations for which you granted Facebook a release?

Mr. SIMONS. I believe they're in the complaint.

Mr. JOHNSON. In the complaint. All right. Thank you.

Mr. CICILLINE. The gentleman yields back.

I now recognize the gentlelady from Georgia, Mrs. McBath, for 5 minutes.

Mrs. MCBATH. Thank you, Mr. Chairman. And thank you all for being here today.

And I want to discuss what your work means for consumers. In our past hearings, we've talked about the consumer welfare standard, the idea that antitrust enforcement should focus on helping our consumers. We've discussed how that approach can sometimes overlook other effects such as employee mobility in the wages.

But what's striking to me is that even with this standard that is supposed to be putting consumers first, consumers are still losing out. They're still far behind. A recent New York Times piece reported that consolidation is estimated to cost the typical American household about $5,000 per year, and with few competitors, huge companies can keep charging us all more without more worrying that we'll actually—that we will actually take our business elsewhere, actually be able to do that without considering that we can take our business elsewhere.

One place that we've seen this is with the merger of Ticketmaster and Live Nation. Anyone who's bought a ticket online can tell you that the price that you see at first is often much less than what you'll pay at the time—by the time all the fees are included and all the fees that are added on. So in 2016, the New York State attorney general said that, and I quote, these fees constitute evidence of abuse of monopoly power, end quote.

So my question today is for you, Mr. Delrahim. Your office recently acknowledged that it's investigating whether Live Nation flouted the 2010 consent decree it agreed to when merging with Ticketmaster. Reporting by The New York Times suggests that Live Nation has actually retaliated against venues that use ticket platforms other than Ticketmaster, violating the consent decree and undermining competition. So behavioral remedies like this consent decree are essentially a promise that a company won't abuse its increased market power following a merger. In your view, is this a cautionary tale about the wisdom of using behavioral remedies?

Mr. DELRAHIM. Absolutely, Congresswoman, it is. And I gave a speech almost 2 years ago about the problems with behavioral remedies. Now, to assure you we have tried to do certain things, we have—all of our consent decrees the last 2 years have four new provisions in there that make them actually more enforceable. That particular consent decree is still active, and other than acknowledging what I acknowledged at the previous hearing, I won't comment on it.

Mrs. MCBATH. Okay. Also, you've been deeply critical of the use of behavioral remedies in the past, observing that they are merely temporary fixes for an ongoing problem. Yet the Division's proposed remedy for the Sprint-T-Mobile merger, includes a long list of things that T-Mobile must do. These include offering operational support, handling billing support, and meeting specific traffic management requirements. And the Division says that its settlement requires the merged entity to divest to Dish, yet the success of the remedy is contingent on all of these behavioral conditions. How can you square this with your stated commitment to structural remedies?

Mr. DELRAHIM. Well, Congresswoman, as you just mentioned, the actual remedy itself is structural. There's transition agreements to

effectuate and maximize the success of such structural remedy, just as we did in Bayer-Monsanto where we divested about $11 billion of assets. But through that period, Bayer and Monsanto had to provide transition services to BASF, and I've never said that those should be somehow shied away from.

But the actual ultimate remedy, like we had in Comcast-NBCU or Live Nation-Ticketmaster or some of the host of some of these, we should be careful. We should be something of a last resort. If there's a structural remedy available, that's what we should be going for.

Mrs. MCBATH. Okay. Thank you.

And, Mr. Simons, the FTC held a workshop earlier this year to address concerns about the online ticket sales. At that event, numerous participants called on the FTC to mandate transparent upfront pricing. What is the FTC doing to address this call to action?

Mr. SIMONS. We're still putting together the results of the workshop, and so the staff will make a recommendation to us.

Mrs. MCBATH. And may we have a live update or may we have access to that information to this committee once that's made available?

Mr. SIMONS. The committee can ask for, you know, can ask for anything, and we're very responsive.

Mrs. MCBATH. Okay. So then for the record, I'm asking that you make that——

Mr. SIMONS. Well, I mean, the chairman——

Mrs. MCBATH [continuing]. Available to the committee.

Mr. SIMONS. Yeah. If the chairman wants it, then we give it. It's done very simple.

Mrs. MCBATH. Okay. Thank you. My time is expired.

Mr. CICILLINE. Thank you.

And that gives me a moment to say thank you, Chairman Simons. Your staff has been terrific in providing technical assistance on our drug pricing effort to reduce prescription drug prices, so——

Mr. SIMONS. And we are thrilled to do it.

Mr. CICILLINE. Thank you. Thank you for that.

I now recognize myself for 5 minutes.

I want to turn, as you both know, Google is under—currently, under really immense antitrust scrutiny by State and Federal enforces as well as this subcommittee. And notwithstanding the scrutiny, Google has nevertheless announced a series of data-driven transactions over the past several months, including its multibillion dollar acquisition of Fitbit and Looker. As I've said before, Google's proposed acquisition of Fitbit would threaten to give it yet another way to surveil users and entrench its monopoly power online.

Earlier today, a coalition of public interest organizations, including Open Markets, Public Citizen, and EPIC, sent a letter to the FTC urging it to block Google's deal to buy Fitbit. As they note, "the hubris of the executive team to pursue an acquisition of this size, a proposed $2.1 billion, while under Federal and State antitrust investigations is astonishing," end quote.

So I'd ask you, Chairman Simons and Mr. Delrahim, do you think we need to consider a merger moratorium for dominant platforms during the course of these ongoing investigations?

Mr. DELRAHIM. Well, Mr. Chairman, I think there's a lot that can be done short of a merger moratorium. I think by doing that, we might risk actually harming consumers, because there could be—there could be mergers and transactions that could be procompetitive. That is not to say that if they're gaining more market share in the same defined market——

Mr. CICILLINE. So how about a qualified moratorium, a moratorium unless it was demonstrated that it was procompetitive?

Mr. DELRAHIM. Flipping the——

Mr. CICILLINE. It seems like your answer is no, but it seems like in this context where there is significant harm being imposed upon consumers, it seems like something worth considering, but I take it you disagree?

Mr. DELRAHIM. I don't necessarily disagree. I don't have a clear administration position on that, but we'd be delighted to explore that with you or, look, there's burdens of proof that you can play with as well, if people have certain market power.

Mr. CICILLINE. Chairman Simons.

Mr. SIMONS. And we're looking at the uncon—we're looking at consummated mergers as part of our Technology Enforcement Division mandate.

Mr. CICILLINE. Thank you.

Chairman Simons, I'm particularly concerned about the FTC's investigative process and whether the FTC makes best efforts to identify the full extent of the violations, especially when it comes to assessing individual liability. And so my first question is, did the FTC depose Mark Zuckerberg or Sheryl Sandberg rather than other senior employees or outside counsel who may lack decision-making authority at Facebook as part of the investigation into Facebook's 2012 consent decree violation?

Mr. SIMONS. It's inappropriate for me to talk about the specific details of the investigation that haven't—in a public forum that haven't been released before.

Mr. CICILLINE. An investigation that's concluded?

Mr. SIMONS. Yes. So, for example, we don't turn over the—we don't make public the——

Mr. CICILLINE. I'm not asking you to make public—I'm just asking were they deposed, did an action happen? Did the FTC depose Mr. Zuckerberg or Sheryl Sandberg as part of that, rather than—or did they depose either of them?

Mr. SIMONS. Oh, okay. So I understand actually that was been public already, so, no, we did not.

Mr. CICILLINE. Okay. Did the FTC depose any high level executive at Facebook as part of this investigation?

Mr. SIMONS. That's not public.

Mr. CICILLINE. Well, at the FTC's press conference, Jim Kohm, Associate Director of the Enforcement Division of the Bureau of Consumer Protection, suggested that the FTC used its power to depose Mark Zuckerberg as leverage to secure a larger settlement sum. He said, and I quote, "part of getting this tremendous result is we didn't need to depose him, but we could use that to get more protections for the public."

And so my question is, is it FTC practice to use depositions as a bargaining chip to secure a higher settlement sum? And if the

purpose of a deposition is to gather more facts, isn't it problematic to trade that away? How can the FTC determine what would constitute an appropriate settlement if the FTC hasn't finished gathering all the relevant facts particularly from the executives of the company?

Mr. SIMONS. So we looked at millions and millions of pages of documents, and even if you—even if we didn't look at his specific files, there would be emails between him and somebody else. And we would have the somebody else's files, right, and their documents.

Mr. CICILLINE. You can understand why this would be of concern to the public, that we would have traded away the right to question the decisionmaker at Facebook in a piece of litigation that you are trying to determine if they violated a consent decree.

Mr. SIMONS. Well, so we know they violated a consent—the consent order, and then that's why—that's why we prepared a complaint and were prepared to sue them. And the settlement that we reached, in my mind at least, I was assuming that if we'd gone to litigation or investigated more—we were already investigating plenty and it was taking a long time, and I wanted the consumers protected. I didn't want this to go on forever. So my own view was that even if we had discovered several more or a handful or even a lot more violations of the consent order, we still wouldn't have gotten nearly the relief we got if we had gone to court.

Mr. CICILLINE. So let me just ask my last question, Mr. Chairman, in 2008, the FTC approved Google's acquisition of DoubleClick, despite many red flags that the deal raised for user privacy and which groups like EPIC pointed out. At the time of the transaction, Google made certain privacy commitments that it broke within a few years. And again, with this notion of repeat offenders, when reviewing transactions, how does the FTC factor in a history of misrepresentations and broken promises by one of the merging parties?

Mr. SIMONS. Yeah. So one thing is clear, they don't get the benefit of the doubt. We assume the worst.

Mr. CICILLINE. Okay.

Mr. SIMONS. And we conduct ourselves accordingly.

Mr. CICILLINE. I want to thank our witnesses.

I hope you understand that the passion of this subcommittee and these questions are because these are issues we care deeply about, and we're reflecting the concerns of our constituents on all of these issues, and I hope this will continue to be an ongoing conversation because you both play a very important role in this work.

This concludes today's hearing. Thank you again to our witnesses.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And before I gavel out, I'd just ask unanimous consent that a letter from the Electronic Privacy Information Center be made a part of the record and a letter to Chairman Simons and Commissioners Chopra, Phillips, Slaughter, and Wilson be made part of the record.

Without objection, the hearing is adjourned.

[The information follows:]

MR. CICILLINE FOR THE RECORD

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November 12, 2019

The Honorable David Cicilline, Chair
The Honorable F. James Sensenbrenner, Ranking Member
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

We write to you regarding the hearing on "Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies."[1] For over two decades, the EPIC has focused public attention on emerging privacy issues, including the growing concentration of the Internet industry.[2] We write to you today to ensure that the Department of Justice and Federal Trade Commission fulfill their responsibility to the American public, and ensure competition, innovation, and the protection of consumer privacy, particularly for Internet-based services.

There are two questions you should ask Chairman Simons: (1) why has the FTC failed to act against the growing consolidation of market power in the Internet industry? (2) why has the FTC disregarded the obvious cost to personal privacy that industry consolidation has produced?

The failure of the FTC to act in these two domains has come at enormous cost, not simply to consumer privacy, but also to competition and innovation in U.S. markets.

The FTC Has Failed to Promote Competition or Consider Data Collection in Merger Review

EPIC was among the first organizations that urged enforcement agencies to consider data protection in merger reviews.[3] More than a decade ago, EPIC filed a complaint with the FTC in

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[1] *Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies*, 116th Cong. (2019), H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law, https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-4-perspectives-antitrust-agencies (Nov. 13, 2019).

[2] *See An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 110th Cong. (2007) (statement of Marc Rotenberg, Exec. Dir., EPIC), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

[3] In 2000, EPIC joined with our colleagues in the TransAtlantic Consumer Dialogue to urge anti-trust authorities reviewing the AOL-Time Warner deal to "condition approval of the proposed merger on the adoption of enforceable Fair Information Practices that would guarantee consumer privacy safeguards at least equal to those that would be provided under the EU Data Directive" TACD, *Merger of American Online and Time Warner an Privacy Protection* (Feb. 2000), http://test.tacd.org/wp-content/uploads/2013/09/TACD-ECOM-17-00-Merger-of-America-Online-and-Time-Warner-and-Privacy-Protection.pdf. Consumer groups anticipated almost two decades that the collection of personal data would become an increasingly important

which we urged the Commission to block Google's proposed acquisition of DoubleClick. EPIC said at the time that the acquisition would enable Google to collect the personal information of billions of users and track their browsing activities across the web.[4] EPIC correctly warned that this acquisition would accelerate Google's dominance of the online advertising industry and diminish competition. The FTC ultimately allowed the merger to go forward over the compelling dissent of Commissioner Pamela Jones Harbour.[5]

EPIC also explained to the FTC that other mergers also posed substantial risks for consumer privacy and competition. In 2011, EPIC warned the FTC that Google's dominance in the search algorithm marketplace was allowing it to preference its own content in search results.[6] Today Google occupies 88% of the search market in the United States[7] and 94% of the search market in Europe.[8] And as Tim Wu explained in his recent book, "Google wants to organize the world's information, but to do so they need to get their hands on all the information in the world."[9]

Google's Acquisition of Nest, and Facebook's Acquisition of WhatsApp Broke Privacy Commitments

Companies that protect user privacy are being absorbed by companies that do not protect privacy. In 2014, EPIC warned the FTC about the privacy risks of Google's acquisition of Nest Labs, a maker of "smart thermostats," stressing that "Google regularly collapses the privacy policies of companies it acquires' and urged the FTC to block the deal.[10] Yet the FTC let the deal go forward without any qualifications.[11]

Most notably, in 2014, Facebook purchased WhatsApp, a text-messaging service that attracted users precisely because of strong commitments to privacy.[12] WhatsApp's founder stated in

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consideration in merger review, particularly among tech firms. *See also*, EPIC Complaint to FTC regarding DoubleClick's proposed acquisition of Abacus Direct (Feb. 10, 2000) ("Not only did DoubleClick deceive consumers by claiming in multiple earlier privacy policies that information collected would remain anonymous, the company also unfairly collects and links information about Internet users without their knowledge or control.")

[4] EPIC, Complaint and Request for Injunction, Request for Investigation and for Other Relief In the Matter of Google, Inc. and DoubleClick, Inc. (Apr. 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

[5] Dissenting Statement of Commissioner Pamela Jones Harbour, *In re Google/DoubleClick,* FTC File No. 070-0170 (Dec. 20, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

[6] Letter from EPIC to the Fed. Trade Comm'n (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_ 09_08_11.pdf.

[7] *Search Engine Market Share United States of America*, Statcounter, http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america.

[8] *Search Engine Market Share Europe*, Statcounter, http://gs.statcounter.com/search-engine-market-share/all/europe.

[9] Tim Wu, *The Curse of Bigness* 126 (2018).

[10] EPIC, *Google Plans Advertising on Appliances, Including Nest Thermostat* (May 22, 2014), https://epic.org/2014/05/google-plans-advertising-on-ap.html.

[11] Fed. Trade Comm'n, Early Termination Notice: 20140457: Google Inc.; Nest Labs, Inc. (Feb. 4, 2014), https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20140457.

[12] EPIC, *In re: WhatsApp*, https://epic.org/privacy/internet/ftc/whatsapp/.

2012 that, "[w]e have not, we do not and we will not ever sell your personal information to anyone."[13] EPIC and the Center for Digital Democracy urged the FTC to block the deal.[14]

The FTC ultimately approved the merger after Facebook and WhatsApp promised not to make any changes to WhatsApp users' privacy settings.[15] However, Facebook announced in 2016 that it would begin acquiring the personal information of WhatsApp users, including phone numbers, directly contradicting their previous promises to honor user privacy.[16] Following this, EPIC and CDD filed another complaint with the FTC in 2016, but the Commission has taken no further action.[17] Meanwhile, antitrust authorities in the EU fined Facebook $122 million for making deliberately false representations about the company's ability to integrate the personal data of WhatsApp users.[18]

Inaction by the FTC has spurred more disregard for the privacy interests of WhatsApp users. Facebook recently said it would target WhatsApp users with ads, despite earlier statements to the contrary and opposition from WhatsApp's founders.[19] And earlier this year, Mark Zuckerberg confirmed Facebook's plans to merge WhatsApp, Facebook Messenger, and Instagram.[20] As we explained for *Techonomy*, a leading journal of tech innovation:

> If the FTC had stood behind its commitment to protect the data of WhatsApp users, there might still be an excellent messaging service, with end-to-end encryption, no advertising and minimal cost, widely loved by internet users around the world. But the FTC failed to act and one of the great internet innovations has essentially disappeared.[21]

Instead, consumers have with fewer options, Facebook has less competition, and the increased amount of data available to Facebook will make it even easier to crush the next competitor.

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[13] WhatsApp, *Why We Don't Sell Ads* (June 18, 2012), https://blog.whatsapp.com/245/Why-we-dont-sell-ads.
[14] EPIC and Center for Digital Democracy, Complaint, Request for Investigation, Injunction, and Other Relief In the Matter of WhatsApp, Inc., (Mar. 6, 2014), https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf.
[15] *See*, Letter from Jessica L. Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, to Facebook and WhatsApp (Apr. 10, 2014), https://epic.org/privacy/internet/ftc/whatsapp/FTC-facebook-whatsapp-ltr.pdf (concerning the companies' pledge to honor WhatsApp's privacy promises).
[16] WhatsApp, *Looking Ahead for WhatsApp* (Aug. 25, 2016), https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp.
[17] EPIC and Center for Digital Democracy, Complaint, Request for Investigation, Injunction, and Other Relief In the Matter of WhatsApp, Inc. (Aug. 29, 2016), https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf.
[18] Mark Scott, *E.U. Fines Facebook $122 Million Over Disclosures in WhatsApp Deal*, N.Y. Times (May 18, 2017), https://www.nytimes.com/2017/05/18/technology/facebook-european-union-fine-whatsapp.html.
[19] Anthony Cuthbertson, *WhatsApp to Start Filling Up with Ads Just Like Facebook*, Independent (Oct. 1, 2018), https://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-update-targeted-ads-status-facebook-brian-acton-a8563091.html.
[20] Mike Issac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. Times (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html.
[21] Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation*, Techonomy (May 4, 2018), https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation.

In the Commission's recent settlement with Facebook, the FTC chose not to undo the mistaken approval of the WhatsApp acquisition against the advice of consumer groups.[22] ***Far from protecting market competition and promoting innovation, the Commission is facilitating industry consolidation.***

Merger Review Should Consider Data Protection

The United States stands virtually alone in its unwillingness to address privacy as a competition issue. The merger of Facebook and WhatsApp has prompted countries in Europe to scrutinize the deal and issue fines.[23] But the FTC has repeatedly failed to even consider consumer privacy and data security in its merger review process.[24] EPIC emphasized the consequences of this failure in comments to the FTC in 2015, stating, "[i]n every instance, it was clear that the practical consequence of the merger would be to reduce the privacy protections for consumers and expose individuals to enhanced tracking and profiling."[25]

EPIC further underscored the dangers of lax enforcement in recent comments to the FTC, noting that Google and Facebook's access to consumer data "is at the very heart of why the digital platforms have been able to entrench their dominance."[26] But as Facebook and Google have developed increasingly invasive tracking of their users, the FTC failed to act. Despite an active consent decree against Facebook, the FTC allowed the company to disclose the personal information of 87 million Americans.[27] The Commission had the power to stop the scandal, simply by enforcing its previous orders in a way that protected consumer privacy.[28]

Antitrust enforcers must treat consumer privacy as the competitive harm it so clearly is. Just last week, Assistant Attorney General Delrahim warned: "it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis."[29] Mr. Delrahim stated further, "Without

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[22] Letter from EPIC et al. to Joseph Simons, Chairman, Federal Trade Comm'n (Jan. 24, 2019), https://epic.org/privacy/facebook/2011-consent-order/US-NGOs-to-FTC-re-FB-Jan-2019.pdf.
[23] *Fuel of the Future: Data is Giving Rise to A New Economy,* Economist (May 6, 2017), http://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy.
[24] Nathan Newman, *15 Years of FTC Failure to Factor Privacy into Merger Reviews*, Huffington Post, (Mar. 19, 2015), https://www.huffingtonpost.com/nathan-newman/15-years-of-ftc-failure-t_b_6901670.html.
[25] EPIC, Comments of the Electronic Privacy Information Center: Assessing the FTC's Prior Actions on Merger Review and Consumer Privacy, FTC File No. P143100, (Mar. 17, 2015), https://epic.org/privacy/internet/ftc/Merger-Remedy-3-17.pdf.
[26] EPIC et al., Comments on Competition and Consumer Protection in the 21st Century Hearings at 19 (Aug. 20, 2018), https://epic.org/apa/comments/EPIC-FTC-CompetitionHearings-August2018.pdf.
[27] Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. Times (March 19, 2018), https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html.
[28] Marc Rotenberg, *How the FTC Could Have Prevented the Facebook Mess*, Techonomy (Mar. 22, 2018), https://techonomy.com/2018/03/how-the-ftc-could-have-avoided-the-facebook-mess ("If the FTC had enforced the Facebook consent order, Cambridge Analytica could not have accomplished its unprecedented data harvest.").
[29] Tony Romm, *DOJ issues new warning to big tech: Data and privacy could be competition concerns,* Wash. Post (Nov. 8, 2019), https://www.washingtonpost.com/technology/2019/11/08/doj-issues-latest-warning-big-tech-data-privacy-could-be-competition-concerns/.

competition, a dominant firm can more easily reduce quality — such as by decreasing privacy protections — without losing a significant number of users."[30]

This is precisely what EPIC has documented in antitrust and privacy complaints to the FTC for more than a decade: each acquisition by a dominant firm has led to a reduction in both competition and privacy protection.

Chairman Simons said in his nomination hearing, "the FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that is the case, the agency needs to determine the reason for such failure and to fix it."[31] But Chairman Simons, when he has had the opportunity to revisit poorly conceived mergers, has failed to act. And now before the FTC is Google's planned acquisition of Fitbit, which is widely opposed by consumer organizations and those who favor market-based competition.

If the FTC approves Google's acquisition of Fitbit, it will be the 230th firm that Google/Alphabet has acquired with barely a whimper from the Federal Trade Commission.[32] This is not antitrust enforcement. This is agency negligence. The Federal Trade Commission's disregard for privacy protection and lax record of antitrust enforcement are diminishing innovation and competition in the United States economy.

It has become increasingly clear that data protection, competition, and innovation are all on the same side in a healthy Internet economy. The critical challenge now for the Committee is to ensure that the Federal Trade Commission fulfills its mission and safeguards these interests. The current path is not sustainable.

Thank you for your timely attention to this pressing issue. We ask that this statement be entered in the hearing record.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

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[30] *Id.*
[31] *Nomination Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 115th Cong. (2018) (statement of Joseph Simons, Chairman, Fed. Trade Comm'n. at 59:40), https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8.
[32] Wikipedia, *List of Mergers and Acquisitions by Alphabet* (Nov. 10, 2019), https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet#cite_note-303

[Whereupon, at 3:32 p.m., the subcommittee was adjourned.]

APPENDIX

Questions for the Record from the Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary

Questions for the Record for the Honorable Joseph Simons, Chairman, Federal Trade Commission

Merger Enforcement

1. **Please provide the performance objectives for managers in merger shops.**

The Bureau of Competition (BC) comprises several merger enforcement divisions, each led by an Assistant Director (AD) and one or more Deputy Assistant Directors (DADs). The ADs and DADs are responsible for carrying out the FTC's competition mission by executing the merger enforcement-related strategies identified in the FTC's annual performance plan.[1] These strategies include, among other things:

- Investigating potentially anticompetitive mergers using rigorous, economically sound, and fact-based analyses that enhance enforcement outcomes and minimize burdens on business; and

- Negotiating merger consent orders and winning litigated orders that have significant remedial, precedential, and deterrent effects.

2. **Are any merger shop managers evaluated based on the number of settlements they reach? If so, do you believe that this incentivizes reaching settlements over litigation?**

No, the number of settlements reached is not an element of performance management for merger shop managers.

The FTC's annual performance plan identifies the agency's performance metrics and goals, which are designed to ensure that the FTC—including its managers and senior leaders—effectively and efficiently uses its limited resources in areas where the agency can achieve the most positive change.[2] The metrics for merger enforcement treat litigated victories the same as settlements or abandoned or restructured transactions.[3] Likewise, we compute consumer savings across all merger enforcement actions (whether resolved through litigation or settlement), and total consumer savings compared to the amount of resources allocated to our merger program.[4]

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[1] FTC, FISCAL YEAR 2018 PERFORMANCE REPORT AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2019 AND 2020 at 36-37, https://www.ftc.gov/system/files/documents/reports/fy-2019-20-performance-plan-fy-2018-performance-report/2020-app-apr.pdf.
[2] *Id.* at 42.
[3] *Id.* at 38 (Key Performance Goal 2.1.1).
[4] *Id.* at 39-40 (Key Performance Goals 2.1.2 & 2.1.3).

3. How does the Commission incentivize staff to recommend and litigate cases where it finds there has been—or is likely to be—harm to competition, even where that litigation may end in a loss?

The FTC does not shy away from litigating difficult cases, and this message is consistently conveyed to staff. Of course, the Commission must consider litigation risks when it determines how best to use its limited resources—but staff knows the Commission does not expect a 100 percent "win" rate. For example, the Commission has brought and prevailed in Supreme Court cases addressing reverse payment pharmaceutical agreements and the state-action doctrine, even after losing at the lower court level.[5] In the last few years, the agency tried and lost two hospital merger challenges in federal district court, only to prevail at the appellate level.[6] And just a couple of weeks ago, the agency lost a preliminary injunction action in federal district court regarding an industrial chemical merger.[7] When the Commission votes to bring these and other challenging cases and to devote considerable resources to them, even after exhaustive discussions of litigation risk, the Commission clearly signals to staff that the Commission has their backs when they seek to vigorously enforce the antitrust laws.

4. Is litigation a risk factor that the Commission considers when deciding whether to challenge a merger?

Yes, the Commission must consider litigation risk as part of our responsibility to be effective stewards of the resources entrusted to us. Antitrust merger litigation is a fast-paced, labor-intensive process, and we are always mindful of resource constraints when weighing enforcement options. But when we determine that a merger poses competitive harm, we do not let concerns over litigation risk dictate our decision to litigate. In assessing when and how to bring an enforcement action in the public interest, we consider multiple factors, but arguably the most important factor is the strength of the evidence. In evaluating the case, we look at the three legs of the stool of any good antitrust case: documents, witnesses, and economic analysis. We try to build merger challenges that have all three legs, but we very often bring cases that have only two—maybe even one—of the three legs.

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[5] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (rejecting lower courts' rulings immunizing reverse-payment settlements that were within the "scope of patent" and allowing antitrust scrutiny under a rule of reason analysis); *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216 (2013) (rejecting lower courts' rulings that state action doctrine immunized hospital acquisition from antitrust laws because state did not clearly and affirmatively express a policy allowing the special-purpose entity hospital authorities to make acquisitions that substantially lessened competition).

[6] *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016). In each case, the FTC alleged that the proposed merger would substantially reduce competition for general acute care inpatient hospital services sold to commercial health plans, leading to higher healthcare costs and lower quality service in local communities, but the district court rejected the FTC's proffered geographic market. On appeal, both circuit courts overturned the district court's decision and validated the FTC's geographic market analysis. The decisions acknowledged the commercial reality of U.S. hospital competition: that because patients prefer to receive hospital services close to home, employers require—and commercial health plans must offer—access to in-network hospitals close to where their employees live. This dynamic—rather than where patients living in the market might travel for healthcare if the cost of hospital services were to rise—determines the relevant geographic market.

[7] *FTC. v. Rag-Stiftung*, No. 1:19-cv-02337-TJK (D.D.C. Feb. 3, 2020), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2337-150.

Of course, we entertain proffered settlement offers that we believe will restore competition, especially when we are confident that the settlement outcome will rival what we might obtain via protracted litigation.

5. Is it appropriate for the Commission to consider litigation risk when deciding whether to vote out a complaint in a merger or case of anticompetitive conduct if the Commission otherwise believes the transaction or conduct violated the antitrust laws?

Yes, consideration of litigation risk is always appropriate and necessary. Antitrust litigation is incredibly resource intensive, and we have an obligation to be good stewards of the resources that Congress has allocated to carry out our dual competition and consumer protection missions. When we decide whether to pursue litigation, we evaluate the likelihood that our enforcement efforts will result in relief to consumers. For the same reason, we also consider whether accepting a well-crafted settlement could resolve the alleged harm much faster, and without expending resources to litigate the case.

Nevertheless, lawsuits are central to effective antitrust enforcement, and the Commission does not hesitate to litigate when necessary. The unprecedented level of antitrust litigation by the Commission over the last two years—including four merger challenges approved unanimously by the Commission and filed in the last two months—shows this. [8]

Litigation risk is just one of many factors that inform the agency's enforcement priorities. Early in my term as Chairman, I identified five factors that I use in prioritizing our enforcement efforts:

i. Does the conduct pose a substantial threat to consumers?
ii. Does the conduct involve a significant sector of the economy?
iii. Does the FTC have experience that will allow it to make an impact quickly and efficiently?
iv. Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?
v. Does the conduct involve unilateral conduct by dominant firms in industries with substantial network effects?[9]

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[8] *See, e.g.*, FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition; FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn; *FTC Press Release, FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business will Harm Competition* (Dec. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse; FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[9] Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium at 4-5 (Sept. 25, 2018),

Following these principles, I believe that the agency is able to deliver the most bang for its buck in bringing litigation cases.

6. **When was the last time that the Commission voted to file a complaint in a case that involved a new or novel theory of harm? Please provide a description of that case.**

On December 17, 2019, the Commission, by unanimous vote, authorized an action to challenge Illumina, Inc.'s proposed acquisition of Pacific Biosciences of California under Section 2 of the Sherman Act and Section 7 of the Clayton Act.[10] The complaint alleged that Illumina violated Section 2 of the Sherman Act by seeking to acquire and therefore extinguish PacBio, a nascent competitive threat to Illumina's 90-percent share monopoly in the U.S. market for next-generation DNA sequencing systems. The complaint also alleged that the proposed acquisition would eliminate current competition and prevent increased future competition between Illumina and PacBio.[11] Two weeks after the Commission issued its complaint, the parties abandoned their transaction.

I note this is not an isolated example. There have been other firsts in the past year, including our first case to preserve competition in private label foods.[12]

7. **According to a September report by the Washington Center for Equitable Growth, non-merger enforcement has been at historical lows over the past two years.[13] What is your response to this report?**

As the report itself noted, "numbers do not tell the entire story." I am proud of the Commission's substantial record on non-merger enforcement during my time as Chairman. The Commission unanimously supported the agency's first action involving a multi-sided

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https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

[10] FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[11] In addition to issuing an administrative complaint, the Commission authorized staff to seek a temporary restraining order and a preliminary injunction in federal court, if necessary, to maintain the status quo pending the administrative proceeding. *Id.*

[12] FTC Press Release, *FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business will Harm Competition* (Dec. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse. Outside the merger context, the Commission also brought its first pharmaceutical product-hopping case this year. The Commission's complaint alleged that the pharmaceutical company made knowingly false statements to the FDA while engaging in a "product hopping" scheme to shift existing patients away from the tablet product about to face generic competition and onto another, more lucrative film product that enjoyed patent protection and provided no legitimate incremental benefits. FTC Press Release, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumerssettling-ftc.

[13] Michael Kades, *The State of U.S. Federal Antitrust Enforcement*, Washington Center for Equitable Growth (Sept. 2019), https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report.pdf.

health information platform,[14] the first case alleging pharmaceutical product hopping as an illegal method of maintaining a monopoly,[15] and most recently, a case filed with the New York Attorney General alleging an illegal course of conduct to maintain high prices for off-patent drugs.[16] In addition, we have many investigations underway.

While there is more variation in the number of competition conduct cases brought from year to year as compared to the FTC's merger enforcement numbers, rest assured that conduct cases are a priority. During the two years that I was the Director of the FTC's Bureau of Competition from 2001-2003, the Commission filed 25 non-merger cases and opened 100 investigations. My commitment to challenging anticompetitive conduct continues today.

Three points are worth noting to provide context regarding the Commission's approach to conduct cases. First, although conduct enforcement is often targeted at the most harmful conduct, our case selection is also about helping to evolve the law. For example, the *Actavis* matter was just one case, but it has been the lynchpin of the Commission's bipartisan, decades-long effort to push back against anticompetitive reverse-payment patent settlements that deter generic drug competition.[17] Second, conduct enforcement matters are particularly time-consuming and often require significant resources to see through to the end. Again, *Actavis* was finally settled last year with broad injunctive relief—a full ten years after the Commission filed its complaint in federal court. Finally, done well, conduct enforcement can have deterrent effects beyond a single case. Again using *Actavis* as an example, one reason for a significant drop off in civil non-merger cases is that the Commission has prioritized challenging reverse-payment pharmaceutical settlements. As a result, there are far fewer problematic settlements.[18]

8. How do you think the Commission should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?

The Commission applies the same methods and analysis to mergers involving all types of investors and owners, including acquisitions made by private equity buyers. I joined a Commission statement in *Staples/Essendant* that addressed concerns that private equity buyers

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[14] FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[15] FTC Press Release, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumerssettling-ftc.

[16] FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

[17] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

[18] The data show that the FTC's *Actavis* litigation has had a substantial deterrent effect in significantly reducing the kinds of reverse-payment agreements that are most likely to impede generic entry and harm consumers. *See* FTC BUREAU OF COMPETITION, AGREEMENTS FILED WITH THE FEDERAL TRADE COMMISSION UNDER THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003: OVERVIEW OF AGREEMENTS FILED IN FY 2016 (May 2019), https://www.ftc.gov/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-fy2016.

require additional scrutiny.[19] As explained in that statement, the antitrust laws focus on curbing harm to the competitive process. Concerns about the motivations of the private equity buyer in that case were unrelated to an analysis of how the acquiring company might use the acquired business to harm the competitive process.

I will keep an open mind when assessing the facts presented in each merger case, but in general, I do not believe acquisitions by private equity buyers require unique scrutiny.

9. **According to Columbia Law School Professor Tim Wu, dominant technology platforms have completed more than 350 mergers and acquisitions to date. Many of these involved Facebook and Google acquiring actual and nascent competitors. Professor Wu observed, "As with a basketball referee who never calls a foul, the question is whether the players have really been faultless—or whether the referee is missing something." How do you respond to the Professor Wu's concern that the agency has been missing something when it comes to merger enforcement in digital markets?**

I was not at the Commission when many of these mergers were reviewed, and therefore do not have first-hand knowledge of how those decisions were reached. But I am sensitive to concerns that the Commission might have missed something. To that end, the Commission is considering whether to use its Section 6(b) authority to examine past mergers and acquisitions by large technology platforms.

Addressing anticompetitive conduct in the technology sector is one of my top priorities. I created the Bureau of Competition's new Technology Enforcement Division to take a fresh look at the markets in which technology platforms compete. If appropriate, the Commission will take action to counter any harmful effects of coordinated or unilateral conduct by technology firms. As we demonstrated in our complaint challenging the Illumina/PacBio merger, acquisitions can be a method of monopolization and so are actionable under a monopolization theory.

10. **You have repeatedly stated that you are committed to blocking "killer acquisitions." Has the Commission challenged any killer acquisitions under your leadership, or developed policies for doing so? If so, please describe the relevant transactions or policies.**

We are aware of concerns that certain firms may be engaging in so-called "killer acquisitions" that have the effect of eliminating nascent or potential competitors, and we are taking this issue very seriously. On the enforcement front, we continue to scrutinize mergers between large incumbents and smaller rivals for potential harm to innovation competition.[20] For example:

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[19] Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

[20] This is consistent with the FTC's past practice. *See, e.g.*, FTC Press Release, FTC, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants

- The Commission recently successfully challenged Illumina's proposed acquisition of PacBio, preserving competition in the U.S. market for next-generation DNA sequencing systems.[21]

- The Commission challenged a consummated acquisition in which the market leader in microprocessor prosthetic knees, Otto Bock, eliminated a primary competitive threat, Freedom Innovations.[22]

- As recently as a few weeks ago, the Commission, by unanimous vote, challenged the consummated acquisition of VieVu, LLC by Axon Enterprise, Inc., the largest provider of body-worn camera systems to large, metropolitan police departments in the United States.[23]

As a complement to our enforcement work, the Commission is considering the use of its Section 6(b) authority to examine past acquisitions by large technology platforms to better understand what was done with the acquired assets.

11. In November, the FTC published a proposed consent order approving Bristol-Myers-Squibb's $74 billion acquisition of Celgene, subject to the divestiture of Celgene's Otezla for $13.4 billion. Although the proposed divestiture is the largest that a U.S. antitrust agency has required in a merger enforcement matter, two commissioners dissented from the order, arguing that the Commission's analysis of pharmaceutical mergers remains narrowly focused on questions of product overlap and neglects critical questions about whether the transaction is likely to facilitate anticompetitive conduct or hamper innovation.

a. Do you believe that an analytical approach that focuses on product overlap is sufficient to capture all potential anticompetitive effects of pharmaceutical mergers?

(Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it (blocking acquisition because Questcor "acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition").

[21] FTC Press Release, *Statement of Gail Levine, Deputy Director of FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. has Abandoned Its Proposed Acquisition of Pacific Biosciences of California* (Jan. 2, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/statement-gail-levine-deputy-director-ftc-bureau-competition.

[22] FTC Press Release, *FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor Prosthetic Knee Companies was Anticompetitive; Assets Must Be Unwound* (Nov. 6, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger.

[23] FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

No, and our analysis is not so limited. In every merger investigation during my tenure, the Commission has evaluated a wide range of theories of competitive harm.[24] For example, in every pharmaceutical merger investigation during my tenure, including *Bristol-Myers Squibb/Celgene*, the Commission has analyzed whether the merger would likely result in harm to innovation competition. We evaluate whether each merger would result in a meaningful decline in the number of firms capable of innovating in specific therapeutic areas (including for generic drugs) and the number of drug manufacturers overall.

Section 6.4 of the *Horizontal Merger Guidelines* explains the FTC's innovation effects analysis.[25] Under Section 6.4, the agencies will consider whether a merger is likely to diminish innovation competition by reducing the merged firm's incentive to continue with an existing product-development effort, or by reducing the merged firm's incentive to initiate development of new products.

As the *Guidelines* instruct, the first type of harm to innovation is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenue from the other merging firm. In the *BMS/Celgene* matter, the Commission determined the acquisition would result in this type of harm to innovation, and ordered BMS to divest Otezla in order to preserve BMS's incentive to continue developing its own oral product for treating moderate-to-severe psoriasis.[26]

When evaluating whether a merger will reduce the merged firm's incentive to develop new products in the future, we look to whether the merger will diminish innovation competition by combining two of a small number of firms with the strongest capabilities to successfully innovate in a specific direction.[27] The Commission evaluated this theory in *BMS/Celgene*, as it does in every pharmaceutical merger investigation, but the evidence developed in *BMS/Celgene* indicated that this type of harm to innovation competition was unlikely to occur.

b. Please identify all pharmaceutical mergers reviewed by the FTC during your tenure as Chairman where the Commission's analysis extended beyond product overlap concerns.

As stated above, the Commission evaluates a wide range of theories of competitive harm in every pharmaceutical merger investigation. In every case, staff considers each relevant theory

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[24] This is consistent with past Commission practice. For example, in the *Teva/Allergan* matter, the Commission evaluated three additional potential theories of harm beyond individual product overlaps: whether the transaction would likely lead to anticompetitive effects from the bundling of generic products; whether it would likely decrease incentives to challenge the patents held by brand-name pharmaceutical companies and bring new generic drugs to market; and whether it might dampen incentives to develop new generic products. Statement of the Federal Trade Commission In the Matter of Teva Pharm. Indus. Ltd. and Allergan plc, No. C-4589 (July 27, 2016), https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf.

[25] U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (2020), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

[26] FTC Press Release, *FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition* (Nov. 15, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation.

[27] Horizontal Merger Guidelines § 6.4.

of harm and, based on the evidence gathered during the investigation, evaluates whether each theory supports a challenge to the transaction.[28]

I appreciate that the price of pharmaceutical products has a significant impact on American consumers' health care costs. I believe that the Commission's rigorous scrutiny of pharmaceutical mergers and anticompetitive conduct[29] is a critical component of fulfilling our mission to protect American consumers, and is one of the agency's most lasting legacies.

c. Please identify all pharmaceutical mergers blocked by the FTC where the Commission's theory of harm extended beyond product overlap concerns.

The Commission has challenged numerous pharmaceutical mergers based on concerns other than product overlaps. For example, the Commission has challenged numerous pharmaceutical mergers to protect innovation competition.[30] The Commission has also challenged pharmaceutical mergers to protect vertical competition. For example, in the *Teva/Allergan* matter, the Commission issued a consent order that required Teva Pharmaceuticals Industries Ltd. to offer its active pharmaceutical ingredient (API) customers the option of entering into long-term API supply contracts.[31] The order resolved concerns that Teva's acquisition of the

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[28] *See, e.g.*, Statement of the Federal Trade Commission In the Matter of Roche Holding and Spark Therapeutics, File No. 191-0086 (Dec. 16, 2019), https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf (noting that "[m]erger investigations are highly fact-specific, and the determination of whether a transaction will result in potential competitive harm requiring an enforcement action is driven by evidence.").

[29] The Commission recently filed a complaint against Vyera Pharmaceuticals, LLC, alleging an anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

[30] *See, e.g.*, FTC Press Release, *FTC, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it (blocking acquisition because Questcor "acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition"); FTC Press Release, *FTC Puts Conditions on Novartis AG's Proposed Acquisition of GlaxoSmithKline's Oncology Drugs* (Feb. 23, 2015), https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition (requiring divestitures of in-development BRAF and MEK inhibitor drugs to ensure development of the BRAF and MEK inhibitors continues uninterrupted, and competition in BRAF and MEK inhibitor markets is not reduced); FTC Press Release, *FTC Puts Conditions on Generic Drug Maker Lupin Ltd.'s Proposed Acquisition of Gavis Pharmaceuticals LLC* (Feb. 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-generic-drug-marketer-lupin-ltds-proposed (requiring divestitures to ensure continued development of generic mesalimine ER capsules, which Lupin and Gavis were developing independently at the time of the merger). For a brief overview of the many other pharmaceutical mergers the Commission has blocked to protect innovation competition, *see* FTC HEALTH CARE DIVISION STAFF, OVERVIEW OF FTC ACTIONS IN PHARMACEUTICAL PRODUCTS AND DISTRIBUTION (Sept. 2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/20190930_overview_pharma_final.pdf.

[31] FTC Press Release, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (July 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle.

generic pharmaceutical business of Allergan plc would increase Teva's incentive to withhold eight APIs from other manufacturers, to benefit newly acquired Allergan products.[32]

In most pharmaceutical mergers, the companies have been willing to divest products and intellectual property sufficient to resolve the Commission's concerns without litigation.

12. At the time of your nomination, you submitted responses to a questionnaire from the Senate Committee on Commerce, Science, and Transportation. In one of your answers, you wrote:

> **The FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that's the case, the agency needs to determine the reason for such failure and to fix it. Even if the evidence shows no such failure, it would be good practice to evaluate more systematically the Commission's merger enforcement program through the regular use of retrospective studies to prevent potential problems in the future. It would also be good practice to extend the retrospectives to non-merger matters as well.[33]**

a. Please identify the number of merger retrospective studies the Commission has pursued during the course of your tenure as Chairman and describe the scope and subject of each study.

b. Please describe the finding of each study.

The Commission's merger retrospective program is an ongoing effort to evaluate the competitive effects of past mergers and acquisitions. Merger retrospectives are an important part of the Bureau of Economics (BE) research program, a significant goal of which is to improve the economic analysis performed to support the Commission's enforcement activities. BE typically has a number of merger retrospectives ongoing at any point in time, including now. The time required to complete these important studies may vary based on a number of factors—not the least of which includes our economists' caseload of enforcement matters, which has been particularly demanding given current staffing levels.

Since the start of my tenure, we have completed several merger retrospectives and have made significant progress on several more. A recently completed study addresses the important question of how the acquisition of the physician practices by hospital systems can affect quality

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[32] APIs are central inputs in manufacturing finished dose form pharmaceutical products. API supply sources must be designated in a drug's FDA marketing application. Switching to a non-designated API source requires a generic drug maker to supplement its Abbreviated New Drug Application (ANDA), a process that can take as long as two years or even more. Consequently, a generic drug manufacturer's API supply options are limited to the sources qualified under its ANDA. Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Teva Pharm. Indus. Ltd. and Allergan, plc, No. C-4589 (July 27, 2016), https://www.ftc.gov/system/files/documents/cases/160727tevaallergananalysis.pdf; *see also* Statement of the Federal Trade Commission In the Matter of Teva Pharm. Indus. Ltd. and Allergan plc, No. C-4589 (July 27, 2016), https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf.

[33] Joseph Simons, Questionnaire Response, Senate Committee on Commerce, Science, and Transportation (Jan. 31, 2018), https://www.commerce.senate.gov/services/files/6c4149af-3023-4825-90f1-3c38e279fd0d.

of care.[34] The outcomes studied represent the progression of hypertension and diabetes patients into worse health states. These outcomes were selected because they are common but serious health problems experienced by the subject population, Medicare beneficiaries. The results indicate that hospital acquisitions of existing physician practices have no statistically significant clinical benefits for the health outcomes considered. This is particularly interesting because the same researchers found in an earlier study that expenditures increased following these mergers.[35] A related, nearly completed study looks at the impact of mergers between physician practices on health outcomes and finds mixed results, depending on the types of practices and the health outcomes considered.

BE staff presented initial results from retrospective studies of two hospital mergers at a June 2019 FTC workshop on certificates of public advantage (COPAs).[36] One study looked at the 1998 hospital merger in Asheville, North Carolina, which the study found resulted in estimated price increases of approximately 20 percent relative to control hospitals.[37] The second study focused on a 1997 hospital merger in Columbia, South Carolina, and found no significant price effects.[38] One possible explanation for the different results is that there were more competitors in the South Carolina case than there were in the North Carolina case.

In order to continue investigating the impact of mergers that are shielded from antitrust scrutiny by COPAs, in October 2019, the Commission issued orders to five health insurance companies and two health systems to provide information that will help the agency conduct retrospective analyses of the effects of two more recent hospital mergers that proceeded subject to COPAs. The FTC intends to collect information over the next several years as part of this effort. The retrospective studies will examine the effects of the COPAs on price, quality, access, and innovation for healthcare services, but also the impact of hospital consolidation on employee wages. Once this multiyear study is complete, the FTC plans to report publicly on its findings.

In addition to our ongoing studies, we currently are working on developing a protocol that will provide the agency with a more systematic framework for identifying and carrying out merger retrospective studies. We also are exploring the possibility of hiring additional economists to increase our capacity for carrying out these studies—something that is possible because of the additional resources that are available to us. As always, we thank the Committee for its continuing support for the FTC's mission.

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[34] This paper followed the usual progression of economic research, which is to release a draft of the paper once the results have largely been obtained, but for the analysis to continue to undergo revision as the authors receive feedback. A draft of this research was released as a Bureau of Economics working paper in 2018, https://www.ftc.gov/reports/effects-physician-hospital-integration-medicare-beneficiaries-health-outcomes.

[35] Thomas G. Koch, Brett W. Wendling & Nathan E. Wilson, *How Vertical Integration Affects the Quantity and Cost of Care for Medicare Beneficiaries*, 52 J. HEALTH ECON. 19 (2017).

[36] FTC Workshop, *A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets* (June 18, 2018), https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage.

[37] *See* slides for *The Mission Health COPA: Evidence on Price Effects from CMS HCRIS Data*, Lien Tran & Rena Schwarz (at 37-53), https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf.

[38] *See* slides for *Palmetto Health COPA: Evidence on Price Effects*, Kishan Bhatt (at 18-36), https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf.

c. Please describe what these studies revealed about the efficacy of the Commission's merger review and enforcement efforts and about how they can be improved.

Although dozens of merger retrospectives have been published, that still is a relatively small sample size. Moreover, the mergers studied are not necessarily representative of the population of mergers. For instance, the studies tend to be concentrated, out of necessity, in industries where relevant data are readily available. As a result, these studies should be interpreted as measuring the effectiveness of specific (non-)enforcement decisions and not as the average price effect of a representative sample of consummated mergers.

Nevertheless, the main implication of this research is that mergers in concentrated markets can lead to price increases, which is consistent with standard economic theory. Given our limited knowledge, it is impossible to draw either broader conclusions about the effectiveness of enforcement or specific guidance as to what market characteristics are more likely to result in anticompetitive mergers. Nevertheless, we hope to address this problem by developing a more systematic merger retrospectives program.

d. Please identify all steps the Commission has taken to evaluate more systematically the Commission's merger enforcement program.

I believe merger retrospectives are critical to ensuring the success of our merger enforcement program. Evaluation of our past choices can provide valuable guidance for our future decisions. The FTC has long been at the forefront of conducting retrospective studies. FTC economists have authored or coauthored more than twenty-five studies that have estimated the effects of mergers on competition.[39] FTC staff have also authored retrospective studies of Commission-ordered divestitures and merger remedies.[40] For example, the most recent study looked back at Commission orders issued between 2006 and 2012. The report found that the agency's process for designing and implementing merger remedies is generally effective and in most cases resulted in remedies that preserved or restored competition that would have been lost due to the merger. The study also identified certain areas in which improvements could be made, particularly for divestitures of limited asset packages in horizontal, non-consummated mergers.

The Commission's *Hearings on Competition and Consumer Protection in the 21st Century* are another important component of our merger retrospective efforts. I announced the *Hearings* with the intention that they would stimulate internal and external evaluation of and commentary on the Commission's law enforcement program. I believe the *Hearings* sessions, including the full day session on merger retrospectives, and public commentary have already done this, and we

[39] FTC Bureau of Economics, List of FTC Bureau of Economics Merger Retrospective Studies (Apr. 2019), https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf.

[40] FTC Staff Report, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (2017), https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics; FTC Staff Report, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), https://www.ftc.gov/reports/study-commissions-divestiture-process.

continue to think critically about these issues.[41] In fact, we currently are working on developing our protocols for identifying viable candidates for future merger retrospective studies. As noted above, the additional resources allocated by Congress will allow us to make developing a more systematic program more feasible, but we still need additional resources in order to build a robust retrospectives program.

The Commission also engages in less formal retrospective learning. As part of its regular antitrust work, staff often investigates mergers and other business activity in the same industries, often in the same geographic market. These subsequent investigations can reveal the effects of earlier transactions and provide some insight into prior enforcement decisions.

Settlement Policy

13. The FTC's recent settlement with Facebook contained an extremely broad release from legal liability. Since violations of many consumer protection statutes—such as the Children's Online Privacy Protection Act (COPPA)—also constitute violations of the FTC Act, it would appear that the proposed settlement releases Facebook from claims under COPPA and other consumer protection statutes. Is that correct?

There has been considerable misunderstanding of the release clause in the 2019 order, which, in fact, is not extremely broad. First, the order only releases claims for known violations of the FTC Act. FTC staff investigated all such potential violations, including allegations received from interest groups and issues reported by the press. Based on these investigations, staff determined there were no known valid claims as of June 12, 2019, other than those addressed in the 2019 order. Thus, the release would not preclude the FTC from addressing any subsequently discovered violation of law by Facebook that occurred prior to or after June 12, 2019. This would include direct violations of the FTC Act, or of any rule or statute the FTC enforces, including the COPPA Rule.

Second, the release of known and unknown claims for violation of the 2012 order is much less dramatic than commonly portrayed. The law in most jurisdictions is very clear that the doctrine of *res judicata* (or claim preclusion) releases all claims, known and unknown, that could have been brought in an order enforcement action.[42] Thus, all the FTC's order enforcement actions, both settlements and victories in court, effectively release all known and unknown claims for order violations. Because preclusion law is different for violations of law (*e.g.*, the FTC Act), the FTC's *de novo* consumer protection settlements (the vast majority of the agency's orders) are

[41] FTC, *Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives* (Apr. 12, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives.

[42] *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract."); *see also Int'l Union of Operating Eng'rs-Emp'rs Constr. Indus. Pension, Welfare, and Training Trust Funds v. Karr*, 994 F.2d 1426, 1429-30 (9th Cir. 1993) (holding claims for breach of the same contract barred by *res judicata*) (citing *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986)); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009-11 (10th Cir. 1990) (same); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499-501 (2d Cir. (2013). The legal analysis in the D.C. Circuit is more complex, but appears to lead to the same result. *See United States Indus. v. Blake Constr. Co.*, 765 F.2d 195 (D.C. Cir. 1985).

simply irrelevant. The fact that the provision is explicit in the 2019 order does not change the legal reality that such a release is not only common, but also automatically prescribed by law.

14. What other Commission orders have contained a comparably broad release of known and unknown order violation claims, as well as all known Section 5 claims?

No other Commission order explicitly contains the same provision. However, as indicated above, all of the FTC's settlement orders addressing order violations, both administrative and federal court orders, effectively contain the same release for known and unknown claims for order violations under the doctrine of *res judicata*.

15. Does the FTC complaint list the full universe of known order violations and known Section 5 violations for which the FTC has granted Facebook release?

The complaint in the Facebook matter alleges all violations that were known to the FTC prior to June 12, 2012.

16. Did the FTC record a full list of conduct that it investigated as potential order violations but ultimately determined did not violate the order?

FTC investigations are non-public, but staff keeps records of what it investigates.

17. Did the FTC record a full list of conduct that it investigated as potential Section 5 violations but ultimately determined did not violate Section 5?

See response to QFR 16, above.

18. Last year, the FTC uncovered a wage-fixing scheme among several health staffing companies in Integrity Home Therapy. Although wage fixing is a clear violation of the antitrust laws, the FTC decided against securing any meaningful relief, declining to secure a finding of admission or liability or to issue formal notification to third parties. In other words, upon discovering that companies were clearly violating the law, the FTC's response was to tell companies not to break the law. FTC Commissioner Chopra has described this as a "no-consequence" settlement. Under what conditions—if any—do you think "no consequence" settlements that solely order a respondent to cease and desist are appropriate?

I disagree that the Commission's order in the *Your Therapy Source* matter is of "no consequence." The Commission's order not only requires respondents to stop engaging in the anticompetitive conduct, but also allows the Commission to seek civil penalties for order violations, which can be a powerful deterrent against recidivism.[43]

[43] *See* Statement of the Federal Trade Commission Concerning the Commission's Consent Order, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, C- 4689 (Oct. 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552414/171_0134_your_therapy_source_commission_statement.pdf.

When appropriate, the Commission seeks equitable monetary remedies to compensate victims for losses resulting from unlawful conduct. But our investigation in the *Your Therapy Source* matter did not yield evidence that any therapists' wages were actually reduced as a result of the illegal agreement to fix wages.[44] The lack of such evidence may be explained by the fact that FTC staff launched an investigation very quickly after learning of the invitation to collude, and stopped the conduct before it had an effect.

I also disagree that Commission enforcement actions ever impose "no consequences" for the wrongdoer. Whenever the Commission charges a company with violating a statute it enforces, we are affirming that we have collected evidence sufficient to give a majority of the Commission a reason to believe that the defendant has violated the law. This public action is a statement of what the law requires and how the company has failed to comply with it. The defendant must agree to stop the illegal conduct, and the Commission may seek additional relief, including monetary equitable remedies, when appropriate. And if the defendant violates the Commission's order, for instance by engaging in the illegal conduct again, it will be subject to civil penalties for each day and for each violation of the order.

19. In October, the Commission filed a complaint charging the high-end cosmetics company Sunday Riley for posting fake reviews at the CEO's direction. These fake reviews deceived consumers and distorted fair competition. Yet the FTC's proposed settlement includes no monetary relief, no notice to consumers, and no admission of wrongdoing. In other words, this company was found clearly breaking the law—and the FTC's remedy is to tell them not to break the law again. This appears to be part of a pattern of "no-consequence" settlements at the FTC. As Commissioner Chopra pointed out in his dissent, honest companies may wonder if they are losing out by following the law. Does failing to penalize lawbreakers incentive law-abiding companies to break the law?

I disagree that this was a "no consequence" settlement, or that the proposed relief in the Sunday Riley case incentivizes companies to break the law.

As a general matter, it is important to note that over the years the Commission has obtained thousands of no-money orders, and we believe these orders impose both specific and general deterrence. In the *Sunday Riley* case, the Commission's proposed complaint alleges violations of Section 5 of the FTC Act relating to Sunday Riley employees having deceptively posted reviews of Sunday Riley products on a third-party website. The Commission's proposed cease and desist order names the company CEO individually and has strong injunctive provisions. It prohibits misrepresenting the status of any endorser or person reviewing a product and failing to disclose any endorser's unexpected material connection; and it requires the company to instruct all employees, agents, and representatives as to their disclosure responsibilities and to get signed

[44] The lack of evidence indicating that any therapists' wages were reduced as a result of the illegal conduct also weighed against requiring respondents to provide notice of the Commission's action to individual therapists targeted by the unlawful conduct. Individual notice would have been unlikely to facilitate recovery in private civil litigation. The Commission will, however, take steps to ensure that the order and facts of the *Your Therapy Source* matter are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing. *See id.* at 2-3.

acknowledgements from them. If Sunday Riley or its CEO violate this order, the U.S. Department of Justice (DOJ) can sue them in federal court and seek large civil penalties. The FTC investigation and resulting negotiations likely cost Sunday Riley significant attorney fees, and the case resulted in considerable negative publicity. Other companies do not want to be subjected to investigations, legal fees, injunctive provisions, compliance costs, reputational costs, and possible future civil penalties—all of which are serious consequences.

Investigative Process

20. In November, California's Attorney General filed a petition in California State Court to enforce a subpoena against Facebook. According to the filing, Facebook has broadly refused to comply with the subpoena by, among other things, refusing to search communications among Facebook's senior executives. Did Facebook try to thwart the FTC's investigation in similar ways? If so, did the FTC take actions in court or otherwise to ensure compliance with FTC discovery requests?

I am unable to comment on our nonpublic investigations. As a general matter, the Commission has authority to compel the production of documents and information if parties do not comply with Commission-issued compulsory process for documents and information in law enforcement investigations. When recipients of process requests move to quash or limit, the Commission makes public its ruling on such a motion.[45]

21. What is the Commission doing to make sure that FTC staff have the support it needs to obtain information from all levels of companies that they are investigating, up to and including the CEOs?

The Office of General Counsel (OGC) has a vigorous program to obtain judicial enforcement of FTC compulsory process. Commission staff is encouraged to contact OGC whenever staff experiences, or even anticipates, a problem with obtaining compliance with a Commission subpoena or civil investigative demand. OGC litigation attorneys then work closely with staff to determine the best course of action to achieve compliance. Early involvement by OGC staff serves to put the process recipient on notice that FTC staff is serious about possible enforcement, which often is sufficient to motivate compliance. However, if a recipient continues to stonewall a Commission investigation, OGC staff are more than willing to file a process enforcement action in federal district court to obtain full compliance.

22. Is the agency's Office of General Counsel prepared to fully and aggressively support staff if and when they need it to enforce FTC-issued subpoenas against any company that may decide they want to ignore such requests, including Facebook?

Yes.

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[45] *See, e.g.*, Order Denying Petition to Limit Civil Investigative Demand and Subpoena Duces Tecum, In the Matter of Civil Investigative Demand to Johnson & Johnson and Subpoena Duces Tecum to Johnson & Johnson, No. 191-0152 (Oct. 18, 2019), https://www.ftc.gov/system/files/documents/petitions-quash/johnson-johnson/1910152jjpetitiontoquash.pdf.

23. How does the number of subpoena enforcement actions in antitrust matters compare to the number in consumer protection matters? If there is a difference, what accounts for the disparity?

Since 2008, the Commission has commenced 41 process enforcement proceedings. These include proceedings to enforce FTC-issued subpoenas, civil investigative demands, and orders to file reports under 15 U.S.C. § 46. Of these 41 proceedings, 27 related to matters investigated by the Bureau of Consumer Protection, and 14 related to matters investigated by the Bureau of Competition or other projects involving competition. When comparing these numbers it is important to keep in mind that a significant portion of the Commission's competition docket involves review of proposed mergers notified under the Hart-Scott-Rodino (HSR) Amendments to the Clayton Act.[46] Under the HSR Act, parties to certain mergers and acquisitions must file premerger notification and wait for government review. After an initial waiting period, if the agency needs additional information, it often issues compulsory process that solicits broad information about the parties' transaction. The parties are prohibited from closing their deal until the waiting period outlined in the HSR Act has passed or the government has granted early termination of the waiting period. As a result, the HSR review process provides a powerful incentive for parties to submit the information that the agencies requested, which allows the Commission to obtain necessary information without resorting to judicial enforcement.

Executive Accountability

24. In your view, when is it appropriate for the FTC to hold individual executives accountable for order violations in which they participated?

This is necessarily a very fact-specific analysis. The Commission first must determine whether we can prove the elements necessary to obtain relief under controlling legal precedent and the provisions of the underlying injunction. Second, the Commission considers whether naming the individual would result in more effective final relief, whether it would better protect consumers, and whether it would be appropriate given the level of the individual's involvement.

25. Please describe what steps the FTC takes to investigate the involvement of individual executives in corporate order violations.

We tailor investigations to the underlying facts and order provisions. That said, in undercover investigations, our attorneys and investigators look for corporate filings, registrations, bank accounts, insider information, consumer complaints, and accounts of former employees. We also share and obtain information, where permissible, with/from our criminal and state law enforcement partners. In open investigations, we look to the same evidence, but also send specific discovery demands to the defendants pursuant to the monitoring provisions in the order. In addition to sending discovery to the investigation's targets, we often send subpoenas to third parties who have relevant information. We craft these demands, among other things, to determine which individuals in the company have responsibility for, and knowledge of, the

[46] 15 U.S.C. § 18a.

practices under investigation. Our standard order provisions also allow us to depose individuals in the target company, and we take that step in appropriate circumstances.

26. Please identify all instances since January 2015 in which the FTC held individual executives accountable for order violations.

The FTC enforces its orders through civil penalty and contempt actions. The Commission currently has pending contempt actions naming individuals as defendants in the *Sanctuary Belize*[47] matter, which went to trial on January 20, 2020; the *Health Research Labs*[48] matter filed in December 2019; and the *Netforce*[49] matter filed in January 2020. The Commission also charged two executives in a recent antitrust filing.[50] Since 2015, we won cases against individuals who were already under FTC order in the following matters: *Blue Hippo*,[51] *GM Funding*,[52] *Lakhany*,[53] *iSpring*,[54] *Capital Home Advocacy*,[55] *Daniel Chapter One*,[56] *Cedarcide*,[57] and *Hi-Tech*.[58] Additionally, for strategic reasons, the FTC will occasionally choose to address an individual's order violations through a *de novo* case. The *CD Capital*,[59] *F9 Advertising*,[60] and *Debtpro 12*[61] matters are examples of this strategy.

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[47] *In re Sanctuary Belize Litig.*, No. 1:18-cv-03309 (D. Md.), https://www.ftc.gov/enforcement/cases-proceedings/0223171/ameridebt-inc.
[48] *FTC and State of Maine v. Health Research Labs., Inc.*, No. 2:17-cv-00467 (D. Me.), https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf.
[49] *FTC v. Noland et al.*, No. cv-20-0047 (D. Ariz.), https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf.
[50] FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.
[51] *FTC v. Bluehippo Funding*, No. 08-Civ-1819 (S.D.N.Y) (contempt entered 2016), https://www.ftc.gov/enforcement/cases-proceedings/052-3092/bluehippo-funding-llc-bluehippo-capital-llc.
[52] *FTC v. Damian Kutzner*, No. 8:16-cv-00999 (C.D. Cal. 2017), https://www.ftc.gov/enforcement/cases-proceedings/x030002/damian-kutzner-0.
[53] *FTC v. Sameer Lakhany*, No. 8:12-cv-337 (C.D. Cal.) (contempt order entered 2015), https://www.ftc.gov/enforcement/cases-proceedings/112-3136/lakhany-sameer-credit-shop-llc-fidelity-legal-services-llc.
[54] *US v. iSpring Water Sys.*, No. 1:19-cv-01620 (N.D. Ga. 2019) (civil penalties for violation of FTC Order), https://www.ftc.gov/enforcement/cases-proceedings/172-3033-c4611/ispring-water-systems-llc-federal.
[55] *FTC v. American Home Servicing Ctr. et al.*, No. 8:18-cv-00597 (C.D. Cal. 2018), at https://www.ftc.gov/enforcement/cases-proceedings/172-3138/capital-home-advocacy-center.
[56] *US v. Daniel Chapter One*, No. 1:10-cv-01362 (D.D.C. 2015) (civil penalties for violation of FTC Order), https://www.ftc.gov/enforcement/cases-proceedings/082-3085/daniel-chapter-one.
[57] *FTC v. Dave Glassel*, No. 4:12-cv-4631 (N.D. Cal. 2018), https://www.ftc.gov/enforcement/cases-proceedings/112-3128/springtech-77376-llc-also-dba-cedarcidecom-et-al/
[58] *FTC v. Hi-Tech Pharm., Inc. et al.*, 1:04-cv-03294 (N.D. Ga. 2017), at https://www.ftc.gov/enforcement/cases-proceedings/022-3165/national-urological-group-inc-et-al.
[59] *FTC v. CD Capital Inv.*, No. 8:14-cv-01033 (C.D. Cal. final order 2019), at https://www.ftc.gov/enforcement/cases-proceedings/132-3289/cd-capital-investments-llc.
[60] *FTC v. F9 Advert.*, No. 3:19-cv-01174 (D. P.R. 2019), https://www.ftc.gov/enforcement/cases-proceedings/1723164/f9-advertising-llc.
[61] *FTC v. DebtPro123*, No. SACV:14-00693 (C.D. Cal. final order 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3112/debtpro-123-llc.

27. The Commission has been criticized for not holding Facebook CEO Mark Zuckerberg personally liable in its $5 billion settlement with Facebook over extensive privacy violations and, furthermore, in not requiring Zuckerberg's appearance as the company's ultimate decision-maker for a deposition during the investigation. What is the Commission doing to ensure that CEOs of large companies are held accountable when their companies violate antitrust law with the CEO's knowledge or at his or her direction?

As you indicate, the Commission and the DOJ did not sue Mr. Zuckerberg personally. However, it is totally inaccurate to suggest that the FTC failed to investigate his role in Facebook's violation or that the 2019 order does not hold him accountable. The FTC thoroughly investigated Facebook, including a review of Mr. Zuckerberg's role in the alleged violations. Among other things, staff carefully reviewed tens of thousands of documents, including emails between key decision makers. The settlement is based upon a careful analysis of the facts uncovered in that review, as well as the law. Significantly, Mr. Zuckerberg's primary asset, Facebook, agreed to pay a massive fine. Had the FTC named Mr. Zuckerberg, any fine assessed against him likely would have been paid by Facebook. Furthermore, as I have noted before, it was highly unlikely that any court would have levied fines approaching the $5 billion we obtained via settlement. Finally, and most importantly, under the settlement, Mr. Zuckerberg must now personally certify compliance with the 2019 order four times every year. That certification is subject to both civil and criminal penalties. This relief represents significantly more accountability than could reasonably have been achieved with the legal tools at the Commission's disposal through continued litigation.

28. The Department of Justice's *Justice Manual* states: "In instances where the Department reaches a resolution with a company before resolving matters with responsible individuals, Department attorneys should take care to preserve the ability to pursue individuals. A Department attorney seeking to allow the release of civil claims related to the liability of individuals based on a corporate settlement must document the basis for the determination that further action against the individuals is not necessary or warranted, and must obtain written supervisory approval of the decision to allow the release of civil claims in the case."[62] Did the FTC follow the *Justice Manual's* recommended approach and document the basis for determining that further action against Mark Zuckerberg or other individuals at Facebook was not necessary or warranted? If not, why not?

The FTC is an independent agency and is not bound by the *Justice Manual*. However, the Commission's procedures for settlement are even stricter than those set forth in the DOJ's *Justice Manual*. No attorney at the Commission, neither a trial attorney nor any manager in their supervisory chain, can settle any matter without approval from the Commission, effectuated by a majority vote on the record. To obtain such permission, staff needs to write a detailed memorandum justifying all the relief they propose. That reasoning is reviewed by the relevant Bureau front office (Consumer Protection or Competition) and the Bureau of Economics.

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[62] U.S. Dep't of Justice, 4-3.100: Pursuit of Claims Against Individuals, https://www.justice.gov/jm/jm-4-3000-compromising-and-closing.

Moreover, Commissioners and their advisors have every opportunity to seek additional information or clarification from staff. The Commission follows this procedure in all cases, including the Facebook order enforcement matter.

29. In their statement, the Commissioners who voted in favor of the proposed settlement with Facebook stated: "Here, we have made the determination that, in light of the meaningful relief we have achieved, retaining the ability to sue Mr. Zuckerberg for past order violations we did not find and for which have been personally liable would not serve the public interest." How did the Majority Commissioners reach this conclusion?

See response to QFR 27, above.

30. When assessing whether to hold individual executives accountable for order violations, what role does a firm's size play in the Commission's analysis?

See response to QFR 31, below.

31. Are there any factors that differentiate the FTC's analysis of individual liability for executives at large companies versus at small companies?

The FTC conducts the same analysis, regardless of the size of a firm, to determine whether to hold an individual liable for violations of the FTC Act. First, we determine whether we can prove the elements necessary to obtain individual injunctive and monetary relief under controlling legal precedent. Second, we consider whether naming the individual is necessary and appropriate to obtain effective final relief and protect consumers.

When determining whether to name an individual officer liable for the acts of a corporation, the Commission considers whether the person's conduct demonstrates a need to have the person under order to protect the public in the future, and whether the person has assets that could contribute to consumer redress or should be disgorged to prevent unjust enrichment. To obtain effective relief, particularly in fraud cases, it is often necessary to name the principles of closely held companies because those individuals can avoid the injunctive requirements of a court order simply by setting up a new corporate entity. Similarly, the principals of closely held companies engaged in fraud often are more directly involved in the unlawful conduct and more likely to pay themselves an outsized share of the proceeds. For these reasons, as a practical matter, it is often more likely to be necessary to name the executives of small, transient companies, especially those engaged in fraud, to protect consumers from future injury, and to get money back to consumers.[63]

[63] The Commission recently, by unanimous vote, authorized a federal court action against Vyera Pharmaceuticals, LLC, alleging an elaborate anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. The complaint seeks remedial injunctive relief as well as equitable monetary relief to provide redress to purchasers who have overpaid for the drug. The complaint also names Martin Shkreli and Kevin Mulleady, who allegedly were directly responsible for orchestrating the anticompetitive scheme, as well as Phoenixus AG, Vyera's parent company. FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-*

Technological Capabilities

32. Earlier this year, the Commission established a Tech Task Force, which later became the Technology Enforcement Division (TED) when it was converted into a permanent Division within the Bureau of Competition.

a. What are the biggest obstacles to enforcement, if any, that TED currently faces?

The largest obstacle to enforcement remains resources. We created the now-renamed TED using existing resources, which meant reallocating personnel from other enforcement Divisions in BC to TED. Since it became a permanent Division, we have expanded TED's leadership to mirror the structure in other permanent Divisions in BC. We have also supplemented its initial staffing with technologists, detailees from within the Commission, and additional newly-hired attorneys in order to address some of these resource challenges.

I am not aware of any legal obstacles to enforcement at this time. As outlined in the Commission testimony, current law provides the Commission with several potential avenues to counter anticompetitive conduct in technology markets, including conduct by technology firms that seek to thwart nascent and potential threats by acquisition or other means.[64]

Combatting anticompetitive conduct in the technology sector is one of my top priorities and we are devoting significant resources to this effort. I greatly appreciate your support for additional resources for the FTC's competition mission.

b. How many attorneys are on the TED's staff who work exclusively on the TED's caseload and when was each of them hired?

As of today, TED has 20 attorneys, and we expect one attorney to join soon. As a result of the additional funding provided in the most recent budget, we intend to add four more attorneys to the Division. When the now-renamed TED was launched, the Bureau of Competition moved 15 attorneys to this unit from other Divisions within the Bureau. That realignment was completed in April 2019. TED has since hired three additional attorneys, who started their positions in the last two months. Additional attorneys have been detailed from other parts of the Commission and are now working full time on TED matters. Division leadership consists of an Assistant Director and two Deputy Assistant Directors. In addition, the Compliance Division of the Bureau of Competition has designated an attorney to work with TED on remedy issues that may arise in the context of investigations and potential enforcement actions.

Saving Drug Daraprim (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

[64] Prepared Statement of the Federal Trade Commission before the H. Comm. on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law (Nov. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1553856/p180101_house_competition_oversight_testimony_-_platforms_part_4_11-13-2019.pdf.

c. How many full-time technologists are on the TED's staff who work exclusively on the TED's caseload and when was each of them hired?

TED has two technologists on staff: one started work in January 2020, and the other will start in early February 2020. Both are dedicated to the work of the Division.

d. How many full-time economists are on TED's staff who work exclusively on the TED's caseload and when was each of them hired?

TED does not have any economists on staff. The FTC has a separate Bureau of Economics, which helps the FTC evaluate the economic impact of its actions by, among other things, providing economic analysis for competition investigations. BE economists are not permanently assigned to work with specific BC or BCP divisions, but are assigned to investigations on a case-by-case basis, taking into consideration not only industry knowledge but also the types of economic expertise each case is likely to require.

Seven economists are currently heavily involved in the work of TED. These economists have tenures at the FTC ranging from around three years to over a decade, and in total represent approximately fifty years of merger enforcement experience at the FTC.

33. Several FTC consent orders have required firms to engage independent third-party assessors to perform security assessments. What processes does the FTC have in place to ensure third-party security assessments are trustworthy and accurate?

The FTC insists on third-party assessors in situations that demand significant levels of expertise. The FTC's orders allow us to refuse to approve an assessment from an assessor who lacks that expertise, or who has shown any indication of not being trustworthy or accurate. Compliance attorneys within the Division of Enforcement, working with attorneys and others from the relevant Division, review all assessors' reports and ask follow-up questions to enhance our understanding of the assessors' processes and conclusions, as well as address any apparent inconsistencies or holes in the assessment. We require companies under order to carry the cost of retaining assessors rather than bear the extremely high cost with our limited budget.

34. Some commentators have suggested that the FTC's decisions to allow Facebook to acquire Instagram and WhatsApp resulted from a lack of understanding of the relevant technology markets. What are you doing to ensure that the TED—as well as other divisions reviewing mergers in technology markets—do not make erroneous decisions due to a lack of understanding of the relevant markets?

I agree that it is important that the FTC have sufficient technical, policy, and economic expertise to consider whether mergers in technology markets could harm competition. That is why I created TED within BC: to marshal resources and expertise to tackle competition issues in the technology sector. I am confident in our ability to understand the relevant industry practices and markets and evaluate mergers and other business conduct.

The recent public *Hearings* were designed to further our knowledge.[65] They included sessions on a number of issues relating to technology and digital markets, including: the identification and analysis of collusive, exclusionary, and predatory conduct by digital and technology-based platform businesses; the antitrust framework for evaluating acquisitions of potential or nascent competitors in digital marketplaces; innovation and intellectual property policy; privacy, big data, and competition; and algorithms, artificial intelligence, and predictive analytics. We received over 900 public comments, which we have reviewed.

TED is hard at work and they are pursuing all leads. The Division has an open-door policy and encourages those with concerns about competition in technology markets to contact them.[66] Likewise, a number of other BC Divisions focus on technology sectors and are carefully considering technological changes and related antitrust implications.

FTC Hearings

35. In September 2018, the FTC launched a series of public hearings to examine "whether broad-based changes in the economy, evolving business practices, new technologies, or international developments may require adjustments to competition and consumer protection law, enforcement priorities, and policy." Has the FTC produced any summaries, findings, or reports following the hearings? If yes, please describe these materials and whether they have been made available to all of the relevant divisions at the agency and Commissioner offices.

The Office of Policy Planning (OPP) has worked closely with all the relevant Bureaus, Divisions, and Offices at the Commission following the hearings, and has provided numerous briefings and resource material to the Commissioners and their offices.

On January 10, 2020, the FTC and DOJ released for public comment draft 2020 *Vertical Merger Guidelines* that would, if adopted, replace the DOJ's 1984 *Non-Horizontal Merger Guidelines*.[67] A number of public comments on the *Hearings* suggested that the agencies should provide updated guidelines and additional guidance on how the agencies evaluate vertical mergers. These Guidelines were prepared and released as part of the Commission's follow-on work product from the *Hearings*.

The FTC expects to release a report on the international hearings, which took place over two days in late March 2019.[68]

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[65] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearingscompetition-consumer-protection.
[66] FTC, Inside the Bureau of Competition: Technology Enforcement Division, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition/technology-enforcement-division.
[67] FTC Press Release, *FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment* (Jan. 10, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment.
[68] FTC, *Hearings on Competition and Consumer Protection in the 21st Century: The FTC's Role in a Changing World* (Mar. 25-26, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century.

In addition, OPP staff are preparing several guidance documents and staff papers as *Hearings* follow-on projects.

36. Does the FTC plan to make public any work product that is a result of the hearings? If so, what process will the FTC have in place to identify whether this work product has support among Commissioners?

As noted above, the FTC and DOJ recently released for public comment draft 2020 *Vertical Merger Guidelines*, and we hope to release a report on the international hearings as well. The Commissioners review and vote to release all formal staff reports, Commission reports, and guidelines; we plan to follow that process for other *Hearings* output.

37. How much did the FTC spend on its public hearings?

The costs directly attributable to the *Hearings* were $562,956.27.

The vast majority of the costs expended related to providing audio/visual services to the public. This amount included onsite video and live webcast hosting, as well as creating a video archive. This provided the public with the greatest transparency into the Commission's hearings. Another significant area of costs included travel and room rentals so that the agency could obtain a wider diversity of views by holding several of the hearings outside the Washington, D.C. area.

38. What type of data did the FTC collect through its public hearings?

The Chairman's announcement of the *Hearings* and the call for comments indicated that "[t]he Commission is especially interested in new empirical research that indicates (or contraindicates) a causal relationship with respect to any of the topics identified for comment."[69] Unfortunately, we have not received this type of information to date.

We are exploring what additional research the agency can do with its limited resources to achieve this goal.

39. In what specific ways have the FTC's hearings on digital platforms and the relationship between privacy, big data, and competition helped TED better investigate potential violations in the tech sector and, when they find violations, bring and win these cases?

The agency does not publicly comment on any pending law enforcement investigation.

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[69] Prepared Remarks of FTC Chairman Simons Announcing the Competition and Consumer Protection Hearings at 2 (June 20, 2018), https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf; FTC, *Hearings on Competition and Consumer Protection: Public Comment Topics and Process*, https://www.ftc.gov/policy/advocacy/public-comment-topics-process.

TED is actively investigating conduct, including consummated mergers, in the technology sector. The *Hearings* covered a number of topics relevant to these ongoing investigations, and the learning and thinking from the *Hearings* is informing that investigative work.

40. In September, the head of the FTC's Office of Policy Planning (OPP), Bilal Sayyed, stated in a speech that is his office is planning to release a guidance document on the application of the antitrust laws to conduct by technology platforms. What are you doing to ensure that OPP's work will complement the work and mission of the Bureau of Competition?

As noted above, the OPP is working closely with all relevant components of the agency on all work product resulting from the *Hearings*. Any formal guidance documents would be voted on by the Commission for public release.

41. Is OPP working with the attorneys in TED to craft these guidelines? If yes, please describe how.

Yes. OPP is preparing the draft in conjunction with BC personnel, including managers and staff from TED.

42. Is OPP coordinating closely with the Department of Justice to craft these guidelines? If yes, please describe how.

The FTC is keeping DOJ informed of our work on this possible guidance document and will welcome their input.

43. What are you doing to ensure that the various parts of the agency are working to support each other in the agency's efforts to promote competition and aggressively enforce the antitrust laws?

The dual mission of the agency, and the support that BE provides for both missions, helps to ensure that the FTC continues to leverage its resources and expertise to vigorously enforce the antitrust laws. TED, in particular, is receiving support for its work from throughout the agency. TED is consulting with staff from BCP's Office of Technology Research and Investigation, which focuses on issues at the intersection of technology with the FTC's consumer protection mission, including fraud, privacy, data security, online and mobile advertising, payment systems, and malware. More generally, BC and BCP leadership are in regular contact and hold regularly-scheduled meetings to ensure consistency in enforcement, and also to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities.

44. What steps does the FTC take to ensure that outside interests do not improperly influence the agency's policy and enforcement decisions?

We took significant steps to ensure that a wide variety of views were reflected during the *Hearings*. We invited legal and economic academics, legal and economic consultants, public interest groups, public advocacy groups, and representatives of businesses and industries to our

hearing sessions. Overall, we hosted over 350 unique non-FTC participants over 24 days of public hearings. We sought public input and, to the greatest extent possible, facilitated informed comments from a wide range of interested parties. For example, before each hearing, we released an agenda, a list of participants, and a list of specific questions for public comment. The comment period also extended well beyond the date of each specific hearing, to allow interested parties to comment on the discussion at the public session. We streamed each hearing session live, and posted a video of the hearing session on our website as a resource for those who could neither attend nor watch live. We also released a transcript of each hearing session shortly after it concluded.

We have received over 900 unique comments on our hearings topics. The FTC posted all germane comments on our website shortly after we received them, allowing the public to comment on points raised.

More generally, the Commission and its staff regularly review arguments and advocacy of parties, persons, and interest groups who comment to us or appear before us on enforcement and policy matters. We always carefully evaluate the information and arguments on the merits.

45. Have you ever received or sent communications from a non-government email or phone number to an executive at a firm under investigation or with a pending merger?

No, I have had no such communications with an executive. I was once contacted via text, on my personal phone, by counsel for one of the parties in an ongoing merger investigation. Counsel was seeking a meeting prior to a Commission vote to authorize an enforcement action, to which I agreed. The Commission subsequently voted to initiate an enforcement action. The matter is now in litigation.

Conflicts of Interest

46. The Commission's rules require former FTC employees to obtain clearance for working on matters that may have been pending while they were employed by the Commission. Please identify how many of these requests the Commission received for each month since January 2017.

A former Commission employee must seek and receive clearance before appearing before a current Commission official or providing behind-the-scenes assistance on a matter that was pending during his or her Commission service, or that "directly resulted from" such a matter.[70] Many "clearance matters" are resolved informally. Such informal resolutions may result in former employees not filing for clearance at all—either because they have been advised that clearance would not be granted, or because a request for clearance is not necessary (*e.g.*, a matter was initiated after the former employee's departure). Thus, the number of reported clearance

[70] 16 C.F.R. § 4.1(b)(2). This rule also requires a former employee to seek and receive clearance before participating in a Commission matter (even if the matter had not yet been initiated formally) if non-public documents or information pertaining to that matter likely would have come to the former employee's attention during the course of his or her official duties, and the employee left the Commission within the previous three years.

requests may be under- and/or over-inclusive. Having said that, the FTC's ethics officials received the following number of clearance requests covering the period of January 1, 2017 to January 10, 2020, broken out by month.

Month/Year	Number of Requests Received	Notes
1/17	1	
2/17	4	
3/17	2	
4/17	2	
5/17	0	
6/17	1	
7/17	3	This number includes one request withdrawn after employee was advised by an FTC ethics official that clearance was not required.
8/17	5	This number includes three requests withdrawn after employees were advised by FTC ethics officials that clearance was not required.
9/17	0	
10/17	0	
11/17	1	
12/17	0	
1/18	0	
2/18	1	
3/18	2	
4/18	2	This number includes one request withdrawn after employee was advised by an FTC ethics official that clearance was not required.
5/18	1	This number includes one request withdrawn after employee was advised by an FTC ethics official that the request would be denied.
6/18	0	
7/18	0	
8/18	0	
9/18	0	
10/18	0	
11/18	1	
12/18	1	
1/19	1	
2/19	4	
3/19	2	
4/19	3	
5/19	1	
6/19	2	

7/19	5	
8/19	5	
9/19	7	
10/19	1	
11/19	1	
12/19	5	
1/2020	2	This number reflects requests received as of February 4, 2020.
TOTAL	**66**	

47. Since January 2017, how many FTC enforcement actions or investigations had a respondent or defendant represented by a former director of the Bureau of Competition, Bureau of Economics, or Bureau of Consumer Protection, or by a former FTC Commissioner?

Apart from clearance requests, the FTC does not track the participation of former Commission employees in FTC enforcement actions or investigations. Based on the clearance requests received and identified above, a former FTC Commissioner or Director represented a respondent or defendant in eight enforcement actions or investigations. This number excludes one request to participate in a matter submitted by a former Director. The excluded request, submitted in May 2018 and identified above, was withdrawn after a former Director received guidance from an FTC ethics official that the request would be denied.

Expert Costs

48. The FTC Office of Inspector General (OIG) identified the escalating costs of expert witnesses as one of the two top "management challenges" facing the FTC in 2019. Please describe each step of the process by which the Commission selects an economic expert or consulting firm to retain, including any processes for setting up competitive bidding, for negotiating fees, and for determining fees.

In October 2019, I instructed staff to adopt several changes in expert acquisition and contract management practices, across both the competition and consumer protection missions. The goal of these changes, which are broadly outlined below, is to reduce expert costs.

- Enhance competition in the expert retention process.
- Use internal experts whenever feasible and consider lower-cost outside expert and support team options.
- Document the processes and considerations involved with expert contracting decisions, including the use of internal experts and support teams.
- Rigorously manage contracts to ensure efficient use of expert resources.

49. Please describe how contracts for outside experts and consulting firms are structured.

The FTC has historically awarded time and materials contracts for outside experts and consulting firms.[71] However, staff also may consider using alternative expert contract structures to manage costs.

50. Please identify any features of the current contract structure that might incentivize outside experts and consulting firms to complete their work in a more or less cost-effective manner.

Termination for cause is the ultimate incentive for any outside expert to perform his or her obligations in an appropriate manner. Staff may also consider using alternative expert contract structures to align incentives and manage costs.

In addition, staff is to maintain detailed data on expert expenditures for each matter. I expect these data will help staff obtain better terms in contract negotiations, select more cost-effective expert teams, and more effectively manage future expert engagements.

51. Please identify what processes the Commission has in place to monitor and review the work performed by outside economic experts and consulting firms.

BC litigating teams work with BE staff to monitor expert and consulting firm performance under engagement contracts.

In addition, the FTC has a series of controls in place such that every dollar added to expert contracts must first proceed through a multistage review. This ensures that decision-makers at all levels are continually aware of expert spending and agree with any allocation of additional funds.

52. In its November 2019 report, the OIG identified several instances where the FTC failed to fully document the process by which it selects experts. Please identify what steps the Commission is taking to rectify this shortcoming.

If staff determines that using an internal expert and/or support team is not feasible for a particular enforcement action, staff must document why an outside expert and/or support team are necessary, and why internal resources are not a viable option.

40 U.S.C. § 559

53. 40 U.S.C. § 559 states: "An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law." Please provide a full list of matters on

[71] Time and materials contracts are indefinite quantity contracts with fixed hourly rates for each labor category that may be required during the engagement with a not-to-exceed amount beyond which the contractor is not authorized to work. These contracts allow for direct expenses (*e.g.*, travel costs, data purchases) incurred as a result of the engagement. Because of the indefinite nature of time and materials contracts, the FTC may fund the work in increments.

which the FTC has consulted with the Attorney General pursuant to this statutory provision.

The cited provision relates to the disposition of Federal property by Federal agencies. The FTC does not dispose of Federal properties subject to this provision.

Political Influence

54. Please identify all officials from the Office of Policy Planning, the Office of General Counsel, the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics that have attended meetings in the White House complex since January 2017 and describe the circumstances of each meeting.

The FTC does not keep a log of its interactions with the White House complex. In consultation with relevant staff, I have attempted to provide the most complete response possible. Many SES-level officials have left the agency between January 2017 and the present, so I cannot state that this is a definitive list of meetings attended by the listed FTC officials at the White House complex during the time in question for the Offices and Bureaus requested.

Month/Year	Bureau/Office	Official	Subject Matter
5/17	Bureau of Economics (BE) Office of Policy Planning (OPP)	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Drug Pricing and Innovation Task Force meeting to discuss drug pricing policies and related anticompetitive practices
6/17	BE	David Schmidt, Assistant Director	Interagency Drug Pricing and Innovation Task Force meeting to discuss drug pricing policies and a meeting to discuss the drug supply chain
7/17	BE	David Schmidt, Assistant Director	Interagency meeting to discuss pharmacy benefits managers
9/17	Bureau of Consumer Protection (BCP)	Daniel Kaufman, Deputy Director	Interagency meeting with National Economic Council staff to discuss Privacy and Data Security
10/17	Bureau of Competition (BC), OPP	Ian Conner, Former Deputy Director (now Director) Tara Isa Koslov, Acting Director	Interagency meeting with National Economic Council staff to discuss Healthcare Competition Executive Order
11/17 (two occasions)	OPP	Tara Isa Koslov, Acting Director	Interagency meeting to discuss report required by Executive Order on Healthcare Competition
11/17	OPP	Tara Isa Koslov, Acting	Discussion with National

		Director	Security Council staff regarding licensure portability for military spouses
11/17	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
12/17	BE, OPP	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
12/17	OPP	Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
12/17	OPP	Tara Isa Koslov, Acting Director	Meeting with Brookings Institution representatives and Interagency Healthcare Competition Executive Order Report Working Group
1/18	BE, OPP	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
2/18	OPP	Tara Isa Koslov, Acting Director	Meeting of report working group for Executive Order on Healthcare Competition and Choice
2/18	OPP	Tara Isa Koslov, Acting Director	Meeting with Hoover Institution representatives and Interagency Healthcare Competition Executive Order Report Working Group
4/18	BCP	James Kohm Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
6/18	OPP	Bilal Sayyed, Director	Interagency meeting with Privacy Policy staff to discuss Privacy Issues
7/18	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
8/18	OPP	Bilal Sayyed, Director	Interagency meeting with the National Economic Council

			staff to discuss Healthcare Competition Executive Order
8/18	OPP	Bilal Sayyed, Director	Lunch with Kathleen Kraninger
9/18	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues
10/18	BE	David Schmidt, Assistant Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss health care provider laws
12/18	BCP	Andrew Smith, Director	Meeting with Privacy Policy staff to discuss Privacy issues
1/19	BCP	Mary Engle, Associate Director	Interagency meeting with National Economic Council staff to discuss transparency and surprise medical billing
2/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss transparency and surprise Medical billing
3/19	OPP	Bilal Sayyed, Director	Interagency meeting with Domestic Policy Council staff to discuss transparency and surprise Medical billing
3/19	BE	Aileen Thompson, Assistant Director	Interagency meeting with National Economic Council staff to discuss antitrust and healthcare.
3/19	BCP	Jennifer Leach, Associate Director	Interagency meeting with Director of Policy staff to discuss the First Lady's Policy for Youth Programs Executive Order
5/19	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues
5/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
6/19	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues

6/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
7/19	BCP	Andrew Smith, Director Mary Engle, Associate Director	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
7/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
8/19	Office of General Counsel (OGC)	Reilly Dolan, Principal Deputy General Counsel Alden Abbott, General Counsel	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
8/19	BE, OPP	David Schmidt, Assistant Director Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss healthcare price transparency and State Healthcare Competitiveness Index
9/19	BCP, OGC	Andrew Smith, Director Reilly Dolan, Principal Deputy General Counsel Alden Abbott, General Counsel	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
9/19	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
9/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss Healthcare Competition Executive Order
10/19	BCP	Andrew Smith, Director	Interagency meeting with Automated Vehicle Fast Track Action Committee to discuss drafting strategy for automated vehicles
10/19	BCP	Daniel Kaufman, Deputy Director	Meeting with National Economic Council staff to discuss BCP issues
10/19	BC	Bruce Hoffman, Former Director; Ian Conner,	Interagency meeting with National Economic Council

		Former Deputy Director (now Director)	staff to discuss Healthcare Competition Executive Order
12/19	BCP	Jennifer Leach, Associate Director	Interagency FLOTUS Be Best Ambassadors celebration

Statutory Authority

55. Under current law, the Commission has the authority to obtain equitable monetary relief under Section 13(b) of the FTC Act. Do you have concerns about the Commission's continued ability to do so? If so, what are your recommendations for actions Congress could take, or should refrain from taking, in support of the Commission's existing authority to obtain equitable monetary relief as a means of holding violators of the FTC Act accountable and providing redress to their victims?

I am gravely concerned that recent judicial decisions have substantially threatened the Commission's ability to use Section 13(b). Congress should clarify the Commission's remedial authority under Section 13(b) to ensure the FTC can continue to get meaningful monetary relief for American consumers.

Section 13(b) of the FTC Act is the FTC's primary, and most efficient and effective, way of providing redress to injured consumers.[72] The relevant portion of Section 13(b), often referred to as the "final proviso," authorizes the FTC to sue in federal court and states as follows: "in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Since the 1980s, courts across the country have held that Section 13(b) allows all types of equitable relief, including money judgments to remedy consumer injuries. In 1994, Congress acknowledged and strengthened the Commission's ability to use Section 13(b) to obtain full monetary relief when it added language to the final proviso of Section 13(b) expanding venue and service of process.[73]

Over the years, the Commission has secured billions of dollars in relief in a wide variety of cases using its Section 13(b) authority, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, just to name a few.

But the Seventh Circuit's recent *Credit Bureau Center* opinion effectively eliminated the FTC's ability to obtain equitable monetary relief in Illinois, Indiana, and Wisconsin, and it may tempt other courts to follow suit. The court, overruling decades of its own precedent holding otherwise, held that the word "injunction" in the statute allows only behavioral restrictions and not

[72] 15 U.S.C. §53(b).

[73] Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15-16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790-91. As the Senate Report noted, "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress…The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." *Id.*

monetary remedies.[74] In addition, the Third Circuit's *ViroPharma* decision held that the FTC may sue under Section 13(b) only when a violation is either ongoing or "impending" at the time the suit is filed, which puts an unnecessary limitation on the Commission's ability to obtain relief for consumers who have been harmed by unlawful conduct that occurred in the past but is not ongoing.[75]

The issue in *Credit Bureau Center* is pending in the courts of appeals for the Third and Eleventh Circuits and is also pending before the Supreme Court in three separate petitions. The Supreme Court is looking at a related question in *Liu v. SEC*, and it is possible that the Court's ruling could adversely affect the FTC's monetary redress authority. The ambiguity created by these cases increases defendants' incentive to litigate instead of settle with the FTC, and increases the agency's costs.

To restore the status quo, Congress should clarify Section 13(b) to reaffirm the Commission's longstanding authority to secure all types of equitable relief, including restitution and disgorgement. In addition, Congress should revise Section 13(b) to clarify that the Commission may sue in federal court to obtain equitable relief even if conduct is no longer ongoing or impending when the suit is filed.

56. Section 19 of the FTC Act authorizes the Commission to seek remedies that are broader than those available under Section 13(b), including damages. Specifically, Section 19 authorizes the Commission to seek this additional relief from a party that is subject to a final FTC order involving an unfair or deceptive act or practice if a "reasonable man" would have known that the act or practice was dishonest or fraudulent.

a. Please identify any cases where the FTC has pursued damages under Section 19 during your leadership.

During my leadership, the FTC has brought many cases under Section 19(a)(1) for violations of rules governing unfair or deceptive acts or practices (UDAP), and we have sought equitable monetary remedies under both 19(a)(1) and Section 13(b), such as disgorgement and restitution.[76] When making awards in these cases, courts do not specify which section of the FTC Act they are relying on. Although "damages" can technically be broader than disgorgement and restitution, as a practical matter they are often equivalent. Moreover, defendants often do not have enough assets to cover restitution judgments, so there is little to gain by seeking the potentially broader scope of damages relief.

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[74] *FTC v .Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).
[75] *FTC v. Shire ViroPharma Inc.*, 917 F.3d 147 (3d Cir. 2019).
[76] Recent examples where we have sought relief under both Section 13(b) and 19(a)(1) include: *FTC v. James Noland, et al.*, No. 2:20-cv-00047 (D.Az. 2020), at https://www.ftc.gov/enforcement/cases-proceedings/x0100166/james-d-noland-jr-success-health; *FTC v. Educare Centre Services, Inc. et al.*, No. 3:19-cv-00196 (W.D.Tx. 2019), at https://www.ftc.gov/enforcement/cases-proceedings/192-3033/educare-centre-services-inc; *FTC and Utah v. Nudge, LLC et al.*, No. 2:19-cv-00867 (D.Utah 2019), at https://www.ftc.gov/enforcement/cases-proceedings/182-3016/nudge-llc.

As for Section 19(a)(2), we have not pursued damages or any other monetary remedies under this section for UDAP violations during my tenure for a number of reasons. Most importantly, we can sue for damages or other relief under Section 19(a)(2) only at the conclusion of an administrative case and all subsequent judicial proceedings, which can take years. In the meantime, there is a significant risk that defendants will dissipate assets, and there is no practical way of preserving them. Moreover, to get any monetary relief in such cases, we have to cross the high hurdle of showing that a "reasonable man would have known under the circumstances" that the conduct was "dishonest or fraudulent."

As a practical matter, consumers are much better served if the FTC brings cases in federal court for injunctive remedies and equitable monetary relief under Section 13(b). In Section 13(b) cases, unlike those that could be brought under Section 19(a)(2), the FTC can readily obtain asset freezes; does not have to complete an adjudicative process before seeking restitution in a separate proceeding; does not face a 3-year statute of limitations; and does not have to prove that in addition to being deceptive or unfair, that a practice was also "dishonest or fraudulent." In addition, the only court to consider the issue has held that Section 19 does not allow disgorgement of ill-gotten gains.

At bottom, I—like other Chairmen and Commissioners before me—seek to use the most efficient tool at my disposal to achieve the best outcome for consumers, and that is what I have done in my tenure. As you know, however, the Commission's ability to use Section 13(b) is facing significant challenges now, and I ask that you clarify the statute to permit the Commission to use this critical tool as courts, for decades, have allowed.

b. Commissioner Chopra has noted that deceptive acts can undermine competition by disfavoring honest businesses. Do you agree that the FTC should assert claims of deception in competition cases where the deceptive act or practice appears to have harmed competition and fair business rivalry?

I agree that it is important for the Commission to combat conduct not only because it harms consumers, but also because it undermines competition. I also agree that deception can be the basis of an anticompetitive act. In fact, when I was the Director for the Bureau of Competition, we brought two cases where we alleged that deceptive practices where at the heart of the anticompetitive scheme: *Rambus* and *Unocal*.[77] And if similar conduct appeared in future cases, I still would support alleging that the company behaved deceptively.

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[77] Compl. at ¶ 1, *In re Union Oil Comp. of Cal.*, Dkt. No. 9305 (Mar. 4, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030304unocaladmincmplt.pdf; ("Unocal actively participated in the CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers."); Compl. at ¶ 2, *In re Rambus Inc.*, Dkt. No. 9302 (June 18, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf ("By concealing this information—in violation of JEDEC's own operating rules and procedures—and through other bad-faith, deceptive conduct, Rambus purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights.").

Questions for the Record from Representative Hank Johnson
Hearing on Online Platforms and Market Power, Part 4:
Perspectives of the Antitrust Agencies
November 13, 2019

1. **Chairman Simons, it's my understanding that the FTC's Bureau of Competition as well as its Consumer Protection Bureau have recently been involved in examining the cybersecurity practices of automobile dealer management software systems. In fact, not long ago, the Consumer Protection Bureau brought and settled an action against one software provider for failing to take reasonable steps to secure consumers' data, which resulted in a breach of data affecting approximately 12.5 million individuals. Meanwhile, the Competition Bureau has been engaged in the investigation of a different software provider under the auspices that its utilization of strong data security protocols could implicate antitrust concerns. Can you please provide some insight into whether the two bureaus are coordinating on important policy issues like the impact of antitrust laws on data security?**

The Commission's organizational structure, at all levels, contributes to its ability to effectively investigate conduct and consider policy issues that implicate both competition and consumer protection missions. For example, at the staff level, Bureau of Competition (BC) and Bureau of Consumer Protection (BCP) staff consult with one another to share expertise gained from recent investigations. Similarly, BC and BCP leadership communicate regularly to ensure consistency in enforcement and to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities. Importantly, the Commissioners themselves ensure that both missions are taken into account: we and our staff see all case-related materials generated by each Bureau, which allows us to directly synthesize competition and consumer protection issues. The agency's five-member bipartisan membership also ensures that critical issues are fully explored during Commission deliberations.

MS. JAYAPAL FOR THE RECORD

Questions for the Record from Representative Pramila Jayapal
Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies
November 11, 2019

Questions for FTC Chairman Joe Simons:

1. **What decision-making process does the FTC utilize to determine the appropriate consequences to impose on lawbreaking companies?**

The Commission uses its enforcement authority to impose consequences for law violators, to reverse the harm caused by the defendant's illegal conduct, and to deter illegal conduct in the future. Choosing the right remedy will depend on the type of violation and the defendant's role in the violation. When staff recommends that the Commission initiate a legal challenge, the recommendation will often include remedial options for the Commission to consider.

Remedies available to the Commission under a variety of statutes fall into three general categories: conduct, structural, and monetary. When the Commission deliberates, it chooses the remedy that is most likely to stop or prevent harm to consumers and, when appropriate, return money to those harmed by the defendant's illegal behavior. In some cases, the defendant is willing to negotiate a settlement of charges in lieu of litigation, and the Commission will issue a consent order along with a complaint that outlines what the defendant has done to violate the law. These negotiated settlements have the force of law, and if the defendant violates the terms of a Commission order, the defendant may be subject to civil penalties. In other cases, the Commission will prosecute its allegations in federal court or in an administrative proceeding to obtain an enforceable injunction against the conduct, as well as other fencing-in relief. In appropriate cases, the Commission may also seek monetary relief in federal court. The Commission does not have the authority to impose monetary relief in an administrative proceeding.

2. **What factors does the FTC rely on to determine whether debarment is an appropriate consequence to impose on defendants that have engaged in anticompetitive behaviors?**

The Commission has never used debarment in a competition case.[79] Because anticompetitive conduct cases typically occur in markets with few competitors, debarment would limit competition, which potentially would exacerbate the competition problem. As a result, we would only consider debarment in the rarest—if any—competition cases.

[79] I am aware that certain commentators have advocated for using debarment in addition to jail time and fines in order to more effectively deter criminal violations of the antitrust laws. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6(2) COMPETITION POLICY INT'L at 3-39 (2010), https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/CPIAutumn2010eBook.pdf. Because the FTC does not have criminal authority to enforce the antitrust laws, I do not have a view on whether debarment would be an appropriate deterrent to criminal conduct. It is my understanding that debarment is not used anywhere for civil antitrust violations.

3. What factors does the FTC rely on to determine whether defendant companies should be required to inform affected parties that they have been harmed?

In many consumer protection cases, the FTC disburses the funds collected from defendants directly to consumers; in these cases, the FTC notifies consumers that they may have been harmed by illegal conduct and are entitled to a refund.[80] In some circumstances, the Commission may require the defendant to notify those affected by its illegal conduct so they can take steps to avoid monetary harm or a threat to their health or safety in the future. When deciding whether to require notice, factors that we consider include: whether those harmed have an ongoing relationship with the defendant; whether they are forgoing other treatments in reliance on defendant's deceptive claims; whether they would otherwise learn about the defendant's illegal conduct on their own; and whether they need notice in order to seek relief available to them under other laws, including state law.[81] The Commission has an interest in making sure the public is aware of our enforcement actions, and in providing sufficient relief to those harmed so that the defendant is unlikely to violate the law again.

4. What factors does the FTC rely on to determine whether defendants should be required to inform affected workers that they have been harmed by anticompetitive behaviors?

I would rely on the factors listed above. Just as consumers are entitled to robust competition for the products and services they buy, workers are entitled to robust competition among employers when they seek employment. Wage-fixing agreements among competing employers are *per se* illegal under the antitrust laws, and the Commission is committed to promoting competition in labor markets for the benefit of all workers.

5. Where the FTC determines that companies made agreements that undermined competition in the labor market and harmed workers, why is the FTC not requiring that those companies provide notice to impacted workers?

Wage-fixing agreements among employers are *per se* illegal, and companies must have programs in place to avoid forming agreements with competing employers that harm workers.[82] When the FTC discovers such an agreement, we will act quickly to stop the illegal behavior, as we did in

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[80] Once an FTC lawsuit or settlement is final and the defendants have paid the money the court orders, the Office of Claims and Refunds in the Bureau of Consumer Protection develops a plan for returning that money to the right people. If there is money left over at the conclusion of the refund program, or if there is not enough money to provide meaningful refund amounts, then the FTC sends the money to the U.S. Treasury, where it is deposited into the General Fund. According to the most recent report on the FTC's refund program, FTC cases resulted in more than $2.3 billion in refunds for consumers between July 2017 and July 2018. FTC OFFICE OF CLAIMS AND REFUNDS, 2018 FTC ANNUAL REPORT ON REFUNDS TO CONSUMERS (Feb. 2019), https://www.ftc.gov/system/files/documents/reports/2018-annual-report-refunds-consumers/annual_redress_report_2018.pdf.

[81] We also consider whether notice is practicable; for example, whether there is a viable means to identify and contact consumers who may have been affected by the conduct.

[82] *See* U.S. Dep't of Justice & FTC, Antitrust Guidance for Human Resource Professionals at 3 (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf (explaining that "naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws").

the Your Therapy Source case, before the agreement has any effect on wages. In the right circumstances—such as when the illegal agreement has actually depressed wages paid to workers—the Commission will consider notifying affected workers or seeking other relief to make them whole.

6. **In the case of *Your Therapy Source*, the FTC found clear evidence that Texas staffing agencies broke the law by secretly making agreements to set low wages for the hard- working therapists they employed and even inviting more agencies to engage in this illegal practice. However, the FTC did not require the defendant agencies to provide notice to impacted workers. Why did the FTC decline to require that affected parties be notified?**

I joined the Commission's statement finalizing the order in this case because, after reviewing all the facts uncovered in our investigation and considering over 100 public comments, I did not believe the order needed to include a requirement to provide notice of the Commission's action to individual therapists targeted by the unlawful conduct.[83] Our investigation did not indicate that any therapists' wages were reduced as a result of the illegal wage-fixing agreement, so individual notice would have been unlikely to facilitate recovery in private civil litigation.[84] The Commission will take steps to ensure that the order and the facts of this case are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing.

7. **What criteria does the FTC use to determine that an admonishment alone is an appropriate consequences to impose on lawbreaking companies?**

If your question implies that the Commission's cease-and-desist orders are mere admonishments, I strongly disagree with that characterization. The Commission will issue a cease-and-desist order to stop the illegal conduct alleged in a complaint and to prevent it from happening again. Commission cease-and-desist orders routinely require respondents to submit periodic reports on their efforts to comply with the order. If the Commission determines that a respondent is not fulfilling its legal obligations, the Commission may seek enforcement of the order and the imposition of civil penalties.[85]

8. **Does the FTC consider admonishments to be a sufficient deterrent to stop companies from engaging in anticompetitive behavior? On what basis has the FTC made that determination?**

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[83] Statement of the Federal Trade Commission Concerning the Commission's Consent Order, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, C-4689 (Oct. 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552414/171_0134_your_therapy_source_commission_statement.pdf.

[84] Notice of the illegal wage-fixing agreement also might have caused consumer confusion, given that none of the therapists' wages were reduced as a result of the illegal agreement.

[85] Failing to submit a complete compliance report can violate Section 10 of the FTC Act, 15 U.S.C. § 50, and lead to civil penalties even in the absence of any violation of the order's other terms.

To reiterate, I do not believe the Commission's cease-and-desist orders are mere admonishments. The Commission's ability to seek civil monetary penalties for cease-and-desist order violations, and to order compliance reporting and monitor compliance, deters respondents from engaging in the prohibited conduct in the future. The possibility of a subsequent private action for treble damages also may have a deterrent effect.

9. **Where the FTC has imposed the power to impose broader consequences on lawbreaking companies, when does the FTC find it appropriate to impose only an admonishment?**

Again, the Commission's orders are not admonishments; they are legally enforceable injunctions. The Commission will continue to seek relief commensurate with the facts and circumstances of each case, including, where appropriate, disgorgement, notice to those affected, and admissions of liability for individuals involved.

10. **Does the FTC commit to carefully scrutinizing each negotiated settlement to determine what remedy would best make the workers who have been harmed by anticompetitive behavior whole?**

Yes, absolutely.

11. **Does the FTC commit to carefully scrutinizing each negotiated settlement to determine what remedy would most effectively deter illegal and anticompetitive conduct by corporations?**

I commit that we will consider all available options for stopping anticompetitive and other illegal conduct, obtaining redress for those harmed, and deterring future violations in every negotiated order.

MR. BUCK FOR THE RECORD

Subcommittee on Antitrust, Commercial and Administrative Law
Hearing on Online Platforms and Market Power, Part 4:
Perspectives of the Antitrust Agencies
Questions for the Record

Question submitted by Representative Buck

1. **In recent months, several issues concerning Apple have raised attention. These include Apple's practices involving its App Store, as discussed in a July 2019 Wall Street Journal article.[78] Other issues include Apple's practices involving the online provision of news, Apple's expansion into audiovisual services, and European authorities' increased focus on and criticism of Apple's payment system. Finally, there may be questions concerning Apple's use of data. Will you consider these issues as you examine whether large online platforms are engaging in practices to consolidate dominant market power?**

I will keep an open mind when assessing the facts presented in each investigation and enforcement action.

Vigorous enforcement in the technology sector is a top priority for me. I created the Bureau of Competition's new Technology Enforcement Division to monitor competition in technology markets, investigate any potential anticompetitive conduct in those markets, and take enforcement actions when warranted.

[78] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, Wall. St. Journal (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

Questions for the Record
Department of Justice
Assistant Attorney General
Makan Delrahim
U.S. House of Representatives
House Judiciary Committee
Subcommittee on Antitrust
At a hearing entitled
"Online Platforms and Market Power, Part 4:
Perspectives of the Antitrust Agencies"
November 13, 2019

Questions submitted by Ranking Member Jim Sensenbrenner

1. **Three years ago, the Division concluded a review of the ASCAP and BMI consent decrees, ultimately concluding that the decrees should not be modified. That multi-year review consisted of various rounds of public comments focused on very specific proposals. In June, the Division launched its current review by soliciting comment on a number of very high-level questions with regard to the decrees rather than any specific proposals. Yet, in August, it was reported that the Division might take action on the decrees before the end of this year.**

    a. **Why does the Division feel that it needs to take action on the decrees at this time? What prompted the Division's review, and subsequent announcement, and what does the Division hope to achieve with this review?**

Response:

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired. Recognizing that perpetual antitrust judgments rarely serve to protect competition, in 1979, the Antitrust Division adopted the practice of including a ten-year sunset provision in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect indefinitely unless a court terminates them.

In 2018, the Antitrust Division embarked on a review of its more than a thousand outstanding perpetual antitrust judgments and, when appropriate, sought termination of them.

To date, seventy-six of seventy-eight jurisdictions have terminated legacy judgments. As part of the review of legacy antitrust judgments, the Division sought public comment on the ASCAP and BMI decrees. The Division advised Congress when it opened the comment period. That comment period ended in August 2019. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019. As the Division reviews the comments, it continues to be engaged actively with the parties and industry stakeholders.

b. If the Division were to decide to make changes to the current decrees will you commit to ensuring the public, as well as the relevant Committees of Congress, have ample opportunity to review and respond to any specific proposed changes before moving forward?

Response:

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and of course, will continue to abide by its obligations under the Music Modernization Act. Furthermore, we would welcome any views you have on these decrees.

2. **Last year, Congress unanimously passed the Music Modernization Act, which was the product of years of legislative discussion between my colleagues in both chambers and stakeholders on all sides of the music industry. A key part of the MMA that led to consensus support was a provision that establishes an enhanced oversight role for Congress in any DOJ review of the ASCAP and BMI consent decrees. The inclusion of this provision reflected an understanding that terminating the ASCAP and BMI consent decrees, even over a long time period, creates significant risk of causing the exact kind of market chaos the MMA solves. I understand that the Department recently solicited comments relating to the decrees and you have made public comments suggesting that you intend to take additional steps to seek changes. If – at some point - the Division intends to sunset these decrees, close consultation with Congress is necessary to ensure that such chaos can be avoided through the implementation of an alternative framework before DOJ takes any action toward sunsetting them, and certainly before terminating them.**

a. Should you take such action, can you detail how you would anticipate complying with those requirements, and additionally how you would anticipate working with Congress to develop an alternative music licensing framework in advance of any action?

Response:

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and of course, will continue to abide by its obligations under the Music Modernization Act. Furthermore, we would welcome any views you have on these decrees.

b. Any termination, sunset or controversial modification of the decrees prior to implementation of an alternative framework will undoubtedly result in significantly increased litigation against ASCAP and BMI. To what extent is the Division factoring in this increased litigation risk in determining how to proceed on these decrees?

Response:

The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division has engaged in extended discussions with numerous parties from all parts of the music industry and will continue to consult with Congress and with such industry stakeholders, as appropriate and as necessary under the Music Modernization Act, before reaching any conclusions with respect to the appropriate action regarding the ASCAP and BMI consent decrees.

c. How does the amount of resources devoted within the past five years to non-mandated reviews of the decrees – the first finding that the decrees remain necessary and should not be altered at all – compare to the resources expended by the Division in the actual administration of the decrees over the same period of time?

Response:

The Division's resources are not just limited, but have in fact declined in real terms by about thirty percent over the last decade. The vast majority of the Division's resources are now, and have been, devoted to directly enforcing the antitrust laws, and I am proud of the merger, conduct, and criminal cases we are bringing, as well the cases we are still developing. The judgment termination initiative is a low-cost, high-impact complement to our enforcement work.

3. For several decades, as you know, ASCAP and BMI have operated under consent decrees administered by the Department of Justice. Within the Antitrust Division Manual, the Department of Justice indicates that consent decrees should not be presumptively terminated "when there is a pattern of noncompliance with the decree or there is longstanding reliance by industry participants on the decree." The Antitrust Division Manual also suggests that consent decrees that fall into this category do not qualify for expedited review. U.S. Dep't of Justice, Antitrust Division, Antitrust Division Manual III-147–48 (5th ed. 2018).

a. Do you believe there has been "longstanding reliance by industry participants" on the consent decrees governing ASCAP and BMI? If so, wouldn't it be more appropriate to review the consent decrees under the Division's traditional approach, instead of an expedited review process?

Response:

The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division has engaged in extended discussions with numerous parties from all parts of the music industry and will continue to consult with Congress and with such industry stakeholders, as appropriate and as necessary under the Music Modernization Act, before reaching any conclusions with respect to the appropriate action regarding the ASCAP and BMI consent decrees.

Questions submitted by Rep. Buck

4. **In recent months, several issues concerning Apple have raised attention. These include Apple's practices involving its App Store, as discussed in a July 2019 Wall Street Journal article.[1] Other issues include Apple's practices involving the online provision of news, Apple's expansion into audiovisual services, and European authorities' increased focus on and criticism of Apple's payment system. Finally, there may be questions concerning Apple's use of data. Will you consider these issues as you examine whether large online platforms are engaging in practices to consolidate dominant market power?**

Response:

Department policy limits my ability to comment on, confirm, or deny the existence of specific investigations, but please be assured that the Division thoroughly investigates allegations of potential antitrust violations and if such a violation is found, it will take whatever actions are necessary to protect competition and consumers.

Questions from Rep. Cicilline

Conduct Enforcement

5. **The *Financial Times* recently reported that criminal prosecutions for price-fixing have reached a historic low for the third consecutive year.[2] According to this report, the Trump Administration's Antitrust Division has brought fewer criminal antitrust prosecutions than any administration in the last 50 years. Is it your view that market participants are no longer engaging in price-fixing at the rates they previously had?**

Response:

The Division is committed to antitrust enforcement against cartels and collusion. These are some of the most egregious antitrust violations—price fixing, bid rigging, and customer and territorial allocation. The Division's criminal sections have been very busy and in FY2019, we brought the first charges in six criminal investigations involving government victims, the financial sector, electronic components, and the commercial construction industry, where victims of antitrust and fraud conspiracies include hospitals and schools. Underscoring how busy we are on developing new criminal matters, the Division closed FY2019 with over 100 pending grand jury investigations, the highest total since 2010. The Division also opened 38 new grand jury investigations in FY2019, more than any year since FY2009. Moreover, in support of our continuing efforts to combat antitrust crimes and related schemes in government procurement, grant, and program funding, in November 2019, the Justice Department announced the Procurement Collusion Strike Force (PCSF). The PCSF is an interagency

[1] *See* Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors* (July 23, 2019) (available at https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221).

[2] Kadhim Shubber, *US price-fixing prosecutions at historic low for third straight year*, FIN. TIMES (Nov. 5, 2019), https://www.ft.com/content/a3b75c80-fe74-11e9-be59-e49b2a136b8d.

partnership among the Antitrust Division, 13 U.S. Attorneys' Offices, and investigators from the Federal Bureau of Investigation and four federal inspectors general.

Our efforts to develop new criminal matters continue to bear fruit. In a two-week span in February 2020, the Division announced charges against seven executives and one company, including the indictment of an executive and a guilty plea from a senior executive, in the Division's long-running investigation into collusion in the generic pharmaceutical industry.

6. Why has criminal enforcement been at a historic low for the past three consecutive years?

Response:

The Antitrust Division's mission is to protect American consumers and taxpayers by deterring, detecting, and prosecuting antitrust crimes. That mission cannot be evaluated purely in terms of criminal fines. There are other important measures of criminal enforcement, such as individual charges, guilty verdicts, prison sentences, and obtaining restitution for victims. Moreover, as our response to Question 5 indicates, not only are our investigations at a ten-year high, but we have recently announced significant charges in vital markets such as the generic pharmaceutical industry, rooted out collusion cheating the American taxpayer, fought to ensure competition for vulnerable victims such as schools and hospitals, and obtained guilty verdicts in trials against a former currency trader and the former chief executive officer of Bumble Bee Foods.

Resolutions of corporate criminal matters can result in significant fines, but they often are followed by individual resolutions and trials that require significant resources but do not yield blockbuster fines. These cases nevertheless are an important part of the Division's enforcement program. In recent years, Division fine totals were driven in substantial part by record-breaking fines obtained in our financial services and auto parts investigations. That resulted in "blockbuster" years—from 2012 through 2015, the Division assessed criminal fines over $1 billion each year, with a high of $3.6 billion in 2015—where criminal fines were greater than fines imposed in previous years. These investigations are now in their later stages, with corporate plea resolutions (the primary driver of the fine statistics) largely completed. Much of the Division's criminal resources have shifted, therefore, to trials of individuals and other high-priority matters that take time to become public. This is consistent with the typical life-cycle of criminal cartel investigations.

That said, our recent fines have been significant. In fact, fines obtained in Division cases doubled from FY2017 to FY2018, and doubled again from FY2018 to FY2019. By way of example, in September 2019, StarKist Co. was ordered to pay a $100 million, statutory maximum criminal fine after a judge rejected its inability to pay claims after nearly a year of litigation over the issue. In March 2019 and November 2018, five South Korea companies agreed to plead guilty to rigging bids for the supply of fuel to U.S. military bases and pay $156 million in criminal fines. In separate civil settlements, the same five companies also agreed to resolve parallel civil antitrust and False Claims Act violations and pay an additional $236 million in total.

Finally, in addition to and coupled with the cyclical nature of our casework, the 2011 decision to close half of the Division's existing criminal sections,[3] and the length of time it took to finalize those closures, has had a significant effect on criminal enforcement.

7. Since your time leading the Antitrust Division, how many monopolization cases under Section 2 of the Sherman Act has the Division brought?

Response:

Where there is evidence of anticompetitive conduct by a firm with significant market power, the Division is not afraid of investigating and, where warranted, challenging it. At the Division, we take our facts as we find them. If an investigation yields evidence a Section 2 violation has taken place, we will not shy away from bringing an appropriate case.

8. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to its own enforcement actions.

Response:

At this time, we are not able to provide exact statistics regarding personnel devoted specifically to these particular ongoing non-public matters, however the Division employs hundreds of attorneys whose primary duties are to conduct investigations of potentially anticompetitive conduct or mergers and take whatever actions are necessary to protect competition and consumers.

9. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to any Section 2 investigations.

Response:

At this time, we are not able to provide exact statistics regarding personnel devoted specifically to these particular ongoing non-public matters. Employees of the Division are salaried government employees whose duties often include handling multiple cases simultaneously.

Merger Enforcement

10. Please identify the performance objectives for section chiefs.

Response:

Sections chiefs are members of the Senior Executive Service, established by Congress under the Civil Service Reform Act of 1978. Under 5 USC § 3131, the Senior Executive

[3] Press Release, U.S. Dep't of Justice, Justice Department Announces More Than $130 Million in Cost Saving and Efficient Measures to Utilize Resources More Effectively (Oct. 5, 2011), https://www.justice.gov/opa/pr/justice-department-announces-more-130-million-cost-saving-and-efficiency-measures-utilize.

Service is administered so as to "ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals)." Division staff and employees are dedicated public servants who consistently demonstrate that their foremost objective is to advance the Division's mission of protecting competition and consumers.

11. Are any section chiefs evaluated based on the number of settlements they reach? If so, do you believe that this incentivizes reaching settlements over litigation?

Response:

Under 5 USC § 3131, the Senior Executive Service is administered so as to "ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals)." Division staff and employees are dedicated public servants who consistently demonstrate that their foremost objective is to advance the Division's mission of protecting competition and consumers.

12. How does the Division incentivize staff to recommend and litigate cases where it finds there has been—or is likely to be—harm to competition, even where that litigation may end in a loss?

Response:

The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles. The Division firmly believes in this mission and endeavors to hire staff who share that belief.

13. How does the Division factor in litigation risk when deciding whether to challenge a merger?

Response:

While litigation risk is one of many factors the Division considers in evaluating enforcement actions, it is important for the Division to bring cases, even risky ones, where it believes a transaction or conduct is illegal.

14. Is it appropriate for the Division to consider litigation risk when deciding whether to file a complaint in a merger or a case of anti-competitive conduct if the Division otherwise believes the transaction or conduct is illegal under antitrust law?

Response:

While litigation risk is one of many factors the Division considers in evaluating enforcement actions, it is important for the Division to bring cases, even risky ones, where it believes a transaction or conduct is illegal.

15. How do you think the Division should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?

Response:

Transactions involving a private equity buyer are subject to the same antitrust laws and standards as those governing any other buyer. In analyzing transactions, the Division considers all relevant market characteristics.

16. What percentage of the Division's second requests in the last six months have been issued for transactions involving or relating to the marijuana industry?

Response:

Department policy limits my ability to comment on specific investigations.

17. For each of the transactions relating to the marijuana industry in which the Antitrust Division has issued a second request, please identify:

a. Whether the transaction fell above the HSR threshold;

b. The pre-merger market share and predicted post-merger market share for the companies involved in the transaction; and

c. The attorneys reviewing the transaction and which section or office they work in.

Response:

Department policy limits my ability to comment on specific investigations.

Digital Markets

18. According to Columbia Law School Professor Tim Wu, dominant technology platforms have completed more than 350 mergers and acquisitions to date. Many of these involved Facebook and Google acquiring actual and nascent competitors. Professor Wu observed, "As with a basketball referee who never calls a foul, the question is whether the players have really been faultless—or whether the referee is missing something."[4] How do you respond to the Professor Wu's criticism that the

[4] Tim Wu & Stuart A. Thomson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html.

antitrust agencies have been missing something when it comes to merger enforcement in digital markets?

Response:

Section 7 of the Clayton Act prohibits mergers and acquisitions "where the effect . . . may be substantially to lessen competition, or to tend to create a monopoly." Acquisitions of nascent competitors can be procompetitive in certain instances and anticompetitive in others. They can be beneficial to the extent they combine complementary technologies or bring products and services to market that would not have been made available to consumers otherwise. There is a myriad of ways in which such a transaction may harm competition in a digital market, particularly the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality. Such circumstances may raise the Antitrust Division's suspicions. The Division will not shrink from the critical work of investigating and challenging anticompetitive conduct and transactions where justified.

19. **In June 2019, Google announced its $2.6 billion acquisition of Looker Data Sciences, a leading startup in data analytics and business intelligence. The American Antitrust Institute and other experts observed that the deal risked eliminating an important competitor to Google and urged the DOJ to scrutinize several aspects of the proposed transaction. In November, the DOJ approved the transaction without pursuing a second request. The UK's Competition Markets Authority, by contrast, has initiated a full investigation into the transaction.**

    a. **How many attorneys at the Antitrust Division worked on reviewing the Google- Looker transaction?**

    b. **How many outside parties did the Antitrust Division interview as part of its review of this transaction?**

    c. **What factors led the Antitrust Division to conclude that this acquisition did not warrant a more in-depth investigation?**

    d. **The American Antitrust Institute identified three issues for the Antitrust Division to examine: (1) whether the acquisition would eliminate Looker as an independent competitor in data analytics and business intelligence tools; (2) whether the acquisition would harm competition in the broader cloud infrastructure market; and (3) whether the acquisition would enhance Google's incentive to withhold Looker's services to rivals. Does the Antitrust Division believe the acquisition will not have any of these effects? If so, please describe the evidence in support of this belief.**

Response:

Department policy limits my ability to comment on specific investigations; however, in typical merger investigations, the Division endeavors to speak with a wide array of market participants. In general, staffing on particular investigations can vary significantly based on, among other factors, the stage of the investigation, the scope of the investigation, and the complexity of the investigation.

20. Do you believe that antitrust enforcers' past reluctance to view concentrated control over data as an entry barrier was a mistake? If yes, what are you doing to make sure the Division does not repeat this error?

Response:

In November 2019, I gave a speech focusing on how we might think about data, arguably the most transformative input in the digital marketplace. That speech can be found here: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition. It provides more significant detail on my views on this topic.

21. How many full-time technologists are on the staff of the Antitrust Division?

Response:

The Division employs a large and diverse workforce from a wide array of backgrounds. Among our many employees with relevant experience, the Division has an entire section devoted to the Technology and Financial Services sectors of the economy, and this section has extensive experience pursuing potential anticompetitive mergers and conduct in the industry. Moreover, our San Francisco Office employs attorneys with extensive experience pursuing potential anticompetitive conduct in the technology industry.

Qualcomm

22. In 2016, the FTC filed suit to challenge illegal monopolization by Qualcomm. This year DOJ took the remarkable step of intervening in the case—to file briefs in defense of Qualcomm. Please explain why it is a good or proper use of agency resources to intervene to defend an alleged monopolist in a monopolization case brought by another federal agency.

Response:

I am recused from that matter and so cannot comment on this topic.

23. As has been publicly reported, Qualcomm was your former client. You did not sign the Antitrust Division's amicus brief in favor of Qualcomm in *Federal Trade Commission v. Qualcomm* but you did sign the Antitrust Division's amicus brief in favor of Qualcomm in *Karen Stromberg, et al. v. Qualcomm*. What accounts for this discrepancy?

Response:

In determining when to recuse myself from matters, I consult with Department of Justice and Antitrust Division career ethics officials and follow their guidance.

24. What involvement did you have with the Division's decision to file its statement of interest and subsequent brief in *FTC v. Qualcomm*?

Response:

None. I am recused from that matter.

25. Since 1948, the Antitrust Division and the Federal Trade Commission have relied on a formal clearance process to allocate primary areas of enforcement responsibility and to avoid overlap and duplicative activity. In light of the Division's recent filing in *FTC v. Qualcomm*, what is the current status and scope of the clearance process? If certain types of activity or certain types of cases are not governed by the clearance process, please identify those instances, the reasons why, and whether this is a departure from past Division process.

Response:

I am recused from the Qualcomm case, so cannot comment on any specifics regarding that case.

The Division and the FTC share authority for civil antitrust enforcement. Over the years, the two agencies have developed a process for determining which agency will handle a particular matter generally on the basis of which agency has the most relevant experience in the particular markets involved. This process, although imperfect, enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests to private parties.

T-Mobile/Sprint

26. Did the staff memorandum and staff attorneys reviewing the Sprint/T-Mobile transaction unanimously recommend blocking the merger?

Response:

Department policy limits my ability to comment on specific investigations; however, in all matters, the Division endeavors to foster robust internal discussion and debate in order to reach decisions that best protect competition and consumers.

27. The Department of Justice recently reached a settlement that will allow T-Mobile to acquire Sprint. As several leading economists noted in a court filing, the DOJ's proposed settlement does not address the significant anti-competitive effects that the

DOJ outlines in its complaint.[5] Why do you believe that Dish, a company with no history or experience in this market, will be a robust competitor as envisioned by the settlement?

Response:

Department policy limits my ability to comment on specific investigations; however, the Competitive Impact Statement,[6] Statement of Interest,[7] and Response to Comments[8] filed by the Division in this matter address these topics.

28. **These experts also noted that Dish has "repeatedly failed to meet" prior requirements stipulated by the Federal Communications Commission.[9] As these experts note, a T- Mobile attorney previously observed that "Dish has a track record of price increases for its services, speculative warehousing of spectrum, and failing to meet FCC-imposed deadlines to construct the facilities required."[10] In light of Dish's failure to meet previous build-out requirements, why do you believe Dish will be successful in building out a 5G network, despite lacking experience and presence in the market?**

Response:

See response to Question 27.

29. **As noted in the economists' comments, even if Dish meets its commitments to build a 5G network covering 70 percent of the population, it would not replace Sprint, which currently reaches over 90 percent of Americans.[11] How would you justify DOJ's settlement to Americans who were covered by Sprint's network but will not be covered by Dish's network?**

Response:

See response to Question 27.

30. **The DOJ has repeatedly cited the fact that Dish is committing to build a 5G network as a factor in favor of approving the transaction. But the DOJ's complaint is clear**

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[5] Nicholas Economides et al., Economists' Tunney Act Comments on the DOJ's Proposed Remedy in the Sprint/T- Mobile Merger Proceeding, https://www.justice.gov/atr/page/file/1214781/download.

[6] Competitive Impact Statement, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed July 30, 2019), *available at* https://www.justice.gov/opa/press-release/file/1189336/download.

[7] Statement of Interest of the United States, New York v. Deutsche Telekom AG, No. 1:19-CV-5434-VM-RWL (S.D.N.Y. filed Dec. 20, 2019), *available at* https://www.justice.gov/atr/case-document/file/1230491/download.

[8] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed Nov. 6, 2019), *available at* https://www.justice.gov/atr/case-document/file/1215706/download.

[9] Economides et al. at 9-10.

[10] *Id.* at 9-10.

[11] *Id.*

that the transaction will harm some parties. Although the complaint states that the merging parties may offer some benefits to rural subscribers, it does not address the fact that the merger will harm other consumers. Is it your view that benefits to one set of customers can justify anti-competitive harms to another set of customers? If so, please describe the circumstances in which you view this to be the case.

Response:

See response to Question 27.

31. **If it is your view that benefits to one set of customers can justify anti-competitive harms to another set of customers, how do you reconcile this position with *Philadelphia National Bank*, where the Supreme Court rejected the idea that some prospective economic or social benefits could remedy anti-competitive harm resulting from an illegal transaction?[12]**

Response:

The Division's mandate is to enforce the antitrust laws to prevent harm to competition. When we determine that a merger threatens competition, we will take the actions necessary to preserve that competition and protect against consumer harm. The DOJ-FTC Horizontal Merger Guidelines note that "[i]n some cases . . . the [antitrust] Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s)."[13]

32. **You have been deeply critical of the use of behavioral remedies, observing that they are "merely temporary fixes for an ongoing problem."[14] Yet the Division's proposed remedy includes a long list of commitments that T-Mobile must undertake for seven or more years to help Dish. These include offering operational support, handling billing support, and meeting specific traffic management requirements. The success of the remedy is contingent on the merging firms adhering to these behavioral conditions, yet this requires the merging firms to act against their economic interest by helping Dish**

    a. **As a law enforcement agency, how is the Justice Department equipped to oversee and evaluate the relationship between T-Mobile and Dish in the years ahead?**

    b. **How is this settlement warranted in light of your criticisms of behavioral remedies and commitment to structural remedies?**

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[12] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 370 (1963).

[13] Horizontal Merger Guidelines, n. 14.

[14] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Federal Telecommunications Institute's Conference in Mexico City (Nov. 7, 2018), https://www.justice.gov/opa/speech/assistant-attorney- general-makan-delrahim-delivers-remarks-federal-institute.

Response:

The Competitive Impact Statement notes that "[t]he proposed Final Judgment requires structural relief in the form of divestitures designed to ensure the development of a new national facilities-based mobile wireless carrier competitor to ultimately remedy the anticompetitive harms that flow from the change in the market structure that otherwise would have occurred as a result of the merger."[15] In enforcement actions resulting in a structural remedy, it is common for there to be a transition period, including often a transition services agreement, to best effectuate the structural remedy.

33. Nine states and the District of Columbia are suing to block the Sprint/T-Mobile merger. Has the Antitrust Division, at any time, made any formal or informal commitment to support T-Mobile/Sprint in their litigation against the state attorneys general? If so, please describe this commitment.

Response:

The Division reached an independent conclusion and filed a Statement of Interest jointly with the Federal Communications Commission in the states' lawsuit against Sprint and T-Mobile. The Division's views vis-a-vis the states' litigation are reflected in the filing.[16]

34. Based on comity and respect for the states challenging the deal, would you be willing to ask the court to delay approving your settlement until the trial court in New York has issued a decision regarding the state's challenge to the Sprint/T-Mobile transaction?

Response:

The Division's views on this topic are reflected in its Response to States' Motion to File Brief as Amici Curiae filed in the Tunney Act proceedings in the D.C. federal district court.[17] Following the trial in *New York v. Deutsche Telekom*, Judge Victor Marrero of the U.S. District Court for the Southern District of New York refused the request from a minority of state Attorneys General to block T-Mobile's proposed acquisition of Sprint. In his opinion, Judge Marrero cited the Justice Department's settlement as a key factor, noting that the Justice Department's settlement made Dish "well poised to become a fourth [Mobile Network Operator] in the market, and its extensive preparations and regulatory remedies indicate that it can sufficiently replace Sprint's competitive impact."[18]

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[15] Competitive Impact Statement, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed July 30, 2019).

[16] Statement of Interest of the United States, New York v. Deutsche Telekom AG, No. 1:19-CV-5434-VM-RWL (S.D.N.Y. filed Dec. 20, 2019).

[17] Response of the United States to States' Motion to File Brief as Amici Curiae, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed Oct. 23, 2019).

[18] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499, at *36 (S.D.N.Y. Feb. 11, 2020).

35. The states' litigation recently revealed text messages between you and executives at Dish. In one of these texts, you wrote to Dish Chairman Charlie Ergen, "Today would be a good day to have your Senator friends contact the chairman," referring to FCC Chairman Ajit Pai.[19]

a. Please identify all other transactions in which you have offered merging parties political advice on how to secure approval for their merger.

b. Do you believe it is appropriate for the Assistant Attorney General of the Antitrust Division to offer merging parties political advice on how to secure approval for their merger?

c. Why did you undertake this action?

Response:

Communications with potential divestiture buyers when negotiating a potential settlement are necessary in order to effectuate settlements that provides the maximum benefit to consumers.

36. The trial also revealed that you gave Mr. Ergen your personal email address.[20]

a. Why did you give Mr. Ergen your personal email address?

b. Did Mr. Ergen send any emails to you about the Sprint/T-Mobile transaction at your personal email address?

c. Please identify all other instances during your tenure as AAG in which you have given your personal email address to parties whose transaction or conduct is being reviewed by the Antitrust Division.

Response:

Use of email and electronic messaging by Department employees, including requirements to preserve official communications, is governed by Department of Justice policy on records and information management. This policy implements federal recordkeeping requirements from statute and regulation at the Department-level. It is my practice to abide by these regulations, such as by forwarding work-related communications from my personal email to my official device. As Mr. Ergen testified at trial, he did not email me on my personal device.

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[19] Sheila Dang, *Dish founder Ergen says he asked for senator's help on T-Mobile/Sprint*, REUTERS (Dec. 18, 2019), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-us-dish-netw/dish-chief-ergen-says-he-asked-for- senators-help-on-t-mobile-sprint-idUSKBN1YM2D3

[20] Erik Larson, *Texts Show DOJ Effort to Enlist Senators in T-Mobile Deal*, BLOOMBERG (Dec. 19, 2019), https://www.bloomberg.com/news/articles/2019-12-18/doj-antitrust-head-told-dish-to-enlist-senators-in-t-mobile-deal.

37. Did you receive any commitment, gifts, or other benefit from Dish, Sprint, or T-Mobile in exchange for your work facilitating the Sprint/T-Mobile transaction?

Response:

No.

38. Please identify what steps you are taking to ensure that you are complying with government record-keeping requirements when you use your personal cell phone or personal email account to discuss Antitrust Division matters.

Response:

Use of email and electronic messaging by Department employees, including requirements to preserve official communications, is governed by Department of Justice policy on records and information management. This policy implements federal recordkeeping requirements from statute and regulation at the Department-level. It is my practice to abide by these regulations, such as by forwarding work-related communications from my personal email to my official device.

Vertical Integration

39. In its challenge to the AT&T/Time Warner transaction, the Justice Department argued that the merger would undermine competition despite the existence of new distribution channels available through Netflix, Amazon Prime, Sling TV, and other companies. Yet, in its recent press statement announcing that the Antitrust Division would be filing to terminate the *Paramount Pictures* consent decree, the Division cited the existence of new technology and distribution channels as a reason why the Paramount decrees were no longer necessary. Why, in your view, is the existence of new distribution channels insufficient to check the anti-competitive incentives created by the vertical merger of AT&T/Time Warner, but sufficient to check the anti-competitive incentives created by vertical integration in the film industry?

Response:

The Department's views are best reflected in the various court filings in those matters. I will note that those matters arose in very different industries, under very different circumstances. Antitrust is a very fact intensive inquiry, and the Division applies its analysis on a case-by-case basis.

40. The Writers Guild of America noted in its submitted comment to the Antitrust Division that "large theatrical distributors wield significant market power over theater owners" and that just three companies are likely to account for more than two-thirds of annual box office receipts. Given the degree of control wielded by distributors, what led the Antitrust Division to conclude that vertical integration by

dominant distributors will not result in anti-competitive practices like block-booking and circuit dealing?

Response:

The United States has moved to terminate the *Paramount* consent decrees that date from the 1940s. These decrees enjoined a number of movie studios from owning movie theaters and imposing certain types of movie licensing practices on theaters. Before moving to terminate the decrees, the Antitrust Division sought public comment. The Writers Guild of America, West, Inc. commented that it was concerned about the three largest theatrical distributors accounting for more than two-thirds of annual box office receipts. While the Guild is correct that the three largest studios may represent approximately two-thirds of box office receipts, it is important to note that they are not all *Paramount* movie studio defendants. Studio market shares have varied substantially over the course of the seventy years the decrees have been in place. For example, Disney, which was a smaller competitor in the 1940s, is the largest movie studio today, yet it is unencumbered by the *Paramount* decrees. While its actions are subject to the antitrust laws, it is not enjoined by the *Paramount* decrees from owning movie theaters or seeking to impose block-booking or circuit dealing licensing practices. Asymmetric obligations for firms similarly situated in an industry may have undesirable (and unintended) effects on competition in an industry over the long run, particularly when that industry has evolved significantly since the restrictions were first imposed.

The Division has not prejudged any potential vertical merger between a movie studio and a movie theater company. Because vertical mergers can combine complementary economic functions and eliminate contracting frictions, they have the potential to create efficiencies that benefit competition and consumers. If a movie studio seeks to acquire a movie theater chain, the Antitrust Division will have the opportunity to investigate the proposed merger. The Division will weigh the potential anticompetitive effects against the cognizable efficiencies that the vertical merger may achieve. If the Antitrust Division determines that the proposed merger will substantially lessen competition—including by increasing the incentive and ability to impose unreasonable block-booking or circuit dealing licensing practices—it can seek to enjoin the parties' transaction to protect competition and consumers. Therefore, terminating the *Paramount* decrees would not divest the Division of its critical, go-to tools for preventing antitrust harms.

Monopsony and Labor

41. Do you believe that anti-competitive restraints on workers that deliver some consumer benefits are permissible under the antitrust laws? If so, please explain why.

Response:

Anticompetitive harm in an upstream labor market does not require proof of downstream harm to be actionable under Section 7 of the Clayton Act. We typically do not credit out-of-market efficiencies in our merger review. Under Section 1 of the Sherman Act, naked restraints are condemned under the per se rule without further inquiry into the

anticompetitive effects of a naked restraint and notwithstanding purported justifications for the restraint. Accordingly, when independent firms that compete in the same labor market enter into agreements that eliminate competition between them for workers, they are considered per se unlawful. It is a fact-laden inquiry, however, whether a restraint in a labor market (or any product market) that is reasonably necessary to a separate, legitimate business transaction or collaboration is lawful. In such circumstances, Supreme Court precedent requires that courts undertake a balancing test that weighs the anticompetitive effects of a restraint in a defined antitrust market against the procompetitive justifications. A number of federal courts are currently assessing these and other kinds of labor market restraints, which were also an important part of our Public Workshop on Competition in Labor Markets in September 2019.

42. In its recent amicus filing in *William Morris Endeavor Entertainment, LLC v. Writers Guild of America, West, Inc.*, the Antitrust Division argued that—contrary to the view of the Writers Guild of America—certain individuals participating in the alleged group boycott are not covered by the labor exemption. The Division's argument seems to rest on the proposition that producers (or some producers) who are Guild members do not fall within the labor exemption either because they are not employees or because they operate in product rather than labor markets, or some combination of the two. How is this position consistent with the Supreme Court's holding in *American Federation of Musicians v. Carroll*?[21]

Response:

The Division did not take a position on the question of whether the statutory labor exemption applied, nor did it take a position on the question of whether the alleged boycott included non-labor groups for purposes of the labor exemption. Instead, we argued that further facts would need to be developed before determining whether showrunners constitute a labor group for purposes of the statutory exemption. We acknowledged the Writers Guild's argument that showrunners should be treated as a labor group as a matter of law because they were similar to the orchestra leaders in *Carroll*, but nonetheless concluded that it would be premature to make a factual comparison between showrunners and orchestra leaders at the pleading stage without further factual development. Having never taken a position on whether showrunners were a labor group, our argument was not inconsistent with *Carroll*.

43. Do you believe that the Court's holding in *Carroll* does not apply to coordination at issue here—a boycott called by the WGA involving its own members—and that producers operate in product markets and do not fall within the labor exemption? If so, how does this position reflect the business model of talent agencies, which involves aggregating bargaining power across multiple producers?

[21] Am. Fed'n of Musicians of U. S. & Canada v. Carroll, 391 U.S. 99, 115 (1968).

Response:

The Division took no position on the application of *Carroll* to the facts in *Writers Guild of America*. Further factual development in discovery is required before determining the extent to which *Carroll* applies.

40 U.S.C. § 559

44. 40 U.S.C. § 559 states: "An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law." Please provide a full list of matters on which executive agencies have consulted with the Attorney General on antitrust matters pursuant to this statutory provision.

Response:

The Division regularly reviews disposals of surplus property under 40 U.S.C. § 559. When a request for review comes to the Division, the matter is assigned to an attorney, who reviews the transaction for potential competition issues. After their review, the attorney prepares a memo for the Section Chief that analyzes whether there are antitrust concerns under the facts. In 2019, the Division reviewed 5 disposal requests – 4 from GSA and one from the Defense Logistics Agency. This number is consistent with prior years.

Amicus Program

45. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to statements of interest and amicus briefs in cases where the United States is not a party and where its participation has not been requested by a court.

Response:

At this time, we are not able to provide exact statistics regarding personnel devoted specifically to these particular ongoing matters. Employees of the Division are salaried government employees whose duties often include handling multiple matters simultaneously.

46. What effect has the Division's amicus program had on its ability to fulfill its obligation to enforce the antitrust laws?

Response:

The Amicus Program (along with the Competition Advocacy Program) is a vital, low-cost, high-impact complement to our enforcement work, and it is long-standing. The amicus program aims to promote precedent that helps clarify, strengthen, or advance sound interpretations of the antitrust laws – which apply in both private and government cases – enabling effective and appropriate enforcement. Without an amicus program, we would have

fewer low-cost, high-impact opportunities to make arguments in court that can shape antitrust jurisprudence. Making greater use of our amicus program is good stewardship of our limited resources.

Expert Costs

47. Please describe each step of the process by which the Antitrust Division selects an economic expert or consulting firm to retain, including any processing for setting up competitive bidding, for negotiating fees, and for determining fees.

Response:

As described in the Division Manual, the selection of prospective expert witnesses in Division investigations involves collaboration between the legal component, the Economics Analysis Group (EAG), the Deputy Assistant Attorney General (DAAG) for Economic Analysis, and the DAAG overseeing the matter. For economic expertise, EAG typically provides an initial list of candidates, which may include internal and external candidates. The EAG manager, often with staff attorneys, contacts potential candidates, discusses the candidates' interest, qualifications, and availability, and, if the candidate is a non-EAG economist, negotiates the scope of work and fees of the contract. The manager or staff point of contact prepares a package including a completed OBD-47 Form that estimates fees and costs for specific services and expenses, and supporting memo that is processed by the Division's Executive Office. All such packages for economist experts must be approved by the Assigned DAAG and the DAAG for Economic Analysis.

48. Please describe how contracts for outside experts and consulting firms are structured.

Response:

Contracts often are structured in two phases: evaluation of the case and preparation of testimony. The scope of work will be defined clearly for each phase. This provides a natural point at which to determine whether or not to continue with the expert. The Division also often incrementally funds the contract, so that performance can be evaluated at multiple times. In order to get a contract approved, the Division staff must provide a detailed estimate of fees, including the hours expected for various tasks and travel expenses, where relevant. In addition, the level of staffing (e.g., how many people can attend a meeting or deposition) typically is addressed, and limited to the minimum number of people needed for effective consultation. The contract defines specific people that are approved to work on the matter along with their rates and includes guidelines for travel and reimbursement. A statement of work with clear deliverables is included as part of the OBD-47 Form, and a requirement for regular invoicing (usually monthly). It is typical for outside experts to provide the Division with a discount from their regular consulting rates.

49. Please identify any features of the current contract structure that might incentivize outside experts and consulting firms to complete their work in a more or less cost-effective manner.

Response:

When the Division determines that an outside expert is needed, there are a number of terms that generally are included in the contract to keep costs down. For example, the level of staffing is addressed in the contract, with approval needed for any support staff the expert uses. In addition, the Division retains the services of less expensive staff from consulting firms to take on delegated tasks at an hourly rate that is less than the expert's rate. The Division also looks to substitute internal staff for external staff even if the expert is external. Contracts also often are incrementally funded. Moreover, in almost all cases, experts would like to be retained by the Division again in the future. This provides the consultant with an incentive to avoid problems being found in the above review (and to resolve any problems that are found).

50. Please identify what processes the Antitrust Division has in place to monitor and review the work performed by outside economic experts and consulting firms.

Response:

Staff works very closely with outside experts, and thus has significant visibility into the work they are performing. In addition, contracts with outside experts require that regular invoices describing their work and the amount of time on specific tasks be provided to the staff point of contact. For economic experts, EAG managers review these invoices in detail and look for any unauthorized tasks or excessive spending relative to tasks.

51. In its November 2019 report, the Justice Department's Office of Inspector General identified several instances where the Federal Trade Commission (FTC) failed to fully document the process by which it selects experts.[22] Please identify what steps the Division has taken to ensure this process is fully documented.

Response:

The Division Manual documents the process by which it selects experts. As described in the Division Manual, the selection of prospective expert witnesses in Division investigations involves collaboration between the legal component, the Economics Analysis Group (EAG), the DAAG for Economic Analysis, and the DAAG overseeing the matter. For economic expertise, EAG typically provides an initial list of candidates, which may include internal and external candidates. The EAG manager, often with staff attorneys, contacts potential candidates, discusses the candidates' interest, qualifications, and availability, and ultimately makes a written recommendation to the Front Office that addresses the selection. Through this recommendation, the process is further documented.

[22] Federal Trade Commission Office of Inspector General, Audit of Federal Trade Commission Expert Witness Services, OIG Report No. A-20-03 (Nov. 14, 2019), https://www.ftc.gov/system/files/documents/reports/final- report-audit-expert-witness-services/final_ftc_oig_report_on_expert_witnesses-redacted_11-14-19.pdf.

Political Influence

52. Earlier this year, the FTC opened an antitrust investigation of Facebook.[23] Reports suggest DOJ has also recently opened its own separate probe of Facebook.[24] What role, if any, did Attorney General William Barr play in deciding that the Antitrust Division would conduct an antitrust investigation into Facebook?

Response:

Department of Justice policy limits my ability to comment on specific investigations. However, Attorney General William Barr, in his role as Attorney General and head of the Department of Justice, oversees the various departmental components, including the Antitrust Division.

53. Has Attorney General William Barr attended or otherwise been involved in any of the reviews of mergers involving the marijuana industry?

Response:

Department of Justice policy limits my ability to comment on specific investigations. However, Attorney General William Barr, in his role as Attorney General and head of the Department of Justice, oversees the Antitrust Division.

54. If the Antitrust Division suspects anti-competitive conduct in a particular industry, what is the standard process for opening and conducting an investigation?

Response:

The Division's investigations may arise from a number of sources, including complaints from citizens or businesses, press reports of various practices, and Hart-Scott-Rodino filings, among other things. Investigations are opened and conducted in a manner appropriate to the particular facts and circumstances in light of overall work across the Division.

55. If the Antitrust Division suspects anti-competitive conduct in the agriculture industry, is it standard process for attorneys from the Transportation, Energy, and Agriculture Section to write the preliminary investigation memo?

Response:

While the Division's civil sections are organized by industry, there is flexibility regarding which section reviews a matter. This flexibility assists the Division in addressing resource constraints, and identifying staff that can most effectively handle a matter. Staff also

[23] Lucas Matney, *Facebook says it's under antitrust investigation by the FTC*, TECHCRUNCH (July 24, 2019), https://techcrunch.com/2019/07/24/facebook-says-its-under-antitrust-investigation-by-the-ftc.

[24] David McLaughlin, *Attorney General Barr Seeks DOJ Facebook Antitrust Probe*, BLOOMBERG (Sept. 25, 2019), https://www.bloomberg.com/news/articles/2019-09-25/attorney-general-barr-sought-doj-facebook-antitrust-probe.

may be detailed to matters outside of their section to lend their specific expertise. The recent Dow/Dupont merger is a good example. Despite having a number of agricultural products at issue, this transaction was investigated and negotiated by the Defense, Industrials, and Aerospace section.

56. MLex has reported that the investigation memorandum in the automakers investigation was written by the policy staff at the Competition Policy and Advocacy Section at the Division.[25] Was this a departure from standard practice and, if so, what accounted for it?

Response:

The policy of the Department of Justice limits my ability to comment on specific investigations. In this matter, as in any other, when allegations of a potential antitrust violation come to the Division's attention, career staff is asked to evaluate and, if they recommend opening an investigation, to draft a recommendation to that effect; and the recommendation is reviewed and approved consistent with appropriate procedures.

57. When the Antitrust Division sends out letters to parties informing them that the Division has initiated an investigation, is it standard practice for attorneys from the relevant enforcement section to be the signatories to these letters? For example, would lawyers from the Transportation, Energy, and Agriculture Section sign a letter to agriculture companies that were the subject of an investigation?

Response:

Investigations are opened and conducted in a manner appropriate to the particular facts and circumstances in light of overall work across the Division. The recent Dow/Dupont merger, despite having a number of agricultural products, was investigated and negotiated by the Defense, Industrials, and Aerospace section, for example, and staff in that section would have been the signatories to most correspondence with the parties, not attorneys with the Transportation, Energy, and Agriculture Section.

58. Did attorneys from the Defense, Industrials, and Aerospace Section sign the letter to the automakers stating that the Antitrust Division was investigating them? If not, why not?

Response:

Department policy limits my ability to comment on specific investigations.

59. Did the Justice Department contact the California Attorney General's office or the California Air Resources Board when deciding whether to initiate the

[25] Leah Nylen, *Probe of automakers' California emissions deal took uncommon route through DOJ*, MLEX (Oct. 24, 2019), https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/probe-of-automakers- california-emissions-deal-took-uncommon-route-through-doj.

investigation? Has the DOJ been in touch with them since initiating the investigation?

Response:

Department policy limits my ability to comment on specific investigations.

60. If no, then why not? If the DOJ is investigating whether the emissions standards agreement that automakers entered into with California constitutes anti-competitive collusion, is understanding California's involvement—specifically when and how California was involved in drafting the emissions agreement—not imperative to getting the relevant facts?

Response:

Department policy limits my ability to comment on specific investigations.

61. For all cases in which the Division has filed statements of interest or amicus briefs, please identify any outside parties that the Antitrust Division consulted.

Response:

Department policy limits my ability to comment on specific investigations. However, in any matter, the Division often meets with a wide array of market participants and interested parties, including parties to the underlying litigation.

62. Please identify each official within the Antitrust Division who has attended meetings in the White House complex since January 2017 and please describe the circumstances of each meeting.

Response:

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing cases or investigations. The Division remains committed to following and enforcing applicable policies related to such contacts.

Travel Costs

63. Please identify the travel costs associated with each speech you have given and conference you have attended during your tenure at the Antitrust Division.

Response:

Travel in my capacity as the Assistant Attorney General fits within Departmental regulations and policy. Travel represents a very small portion of the Division's overall budget

but plays an important role in furthering the mission of the Antitrust Division. For instance, travelling to meet with leaders from foreign competition authorities helped me to organize the community of international enforcers to agree upon a first of its kind multilateral framework on due process in antitrust enforcement. I am proud that on April 3, 2019, the Steering Group of the International Competition Network (ICN) unanimously approved the Framework on Competition Agency Procedures, or CAP, and invited all antitrust agencies, whether ICN members or not, to participate in the framework to promote fundamental due process in antitrust enforcement globally. The CAP came into effect on May 15, 2019, and over seventy competition agencies have committed to the framework, a major accomplishment for the Antitrust Division.

Morale

64. The 2018 Federal employee viewpoint survey reports that the Antitrust Division's employee engagement dropped from a score of 74% in 2015 to a score of 59% in 2018. According to the survey, employee engagement evaluates factors that lead to an engaged workforce, including supporting employee development and communicating agency goals. By comparison, for 2018, the government-wide average was 68% and the FTC score was 83%. What accounts for the Division's below average score? What are you doing to address this significant decline in employee engagement?

Response:

The Division employs very talented lawyers, economists, and staff, and I am proud to serve alongside them every day. Whether in our enforcement or policy efforts, I am a firm believer that key to our success is maintaining a talented and devoted staff. The Division must continue to attract and retain bright, talented, and passionate individuals—whether they be attorneys, economists, paralegals, or support staff. We have taken a number of initiatives to ensure we continue attracting and keeping a talented staff, including establishing the James F. Rill Fellowship program, the Jackson-Nash addresses, and a rotation program for Division attorneys.

Questions from Rep. Jayapal

65. Please explain whether and how the DOJ weighed the best interests of workers when choosing to file a brief in *Stigar v. Dough Dough* (WA Eastern District).

Response:

As I explained during my testimony on November 13, 2019, franchise no-poach agreements potentially maintain the incentive of franchise owners to invest in the training of their workers. More employers willing to invest in worker training would create more job opportunities for entry-level workers. The Division recognizes that courts are likely to treat restrictions on the mobility of managerial workers differently from low-skilled workers. The Division also took into account the effect that categorizing franchise no-poach agreements as

per se unlawful would have on challenges to the Division's application of the per se rule in future criminal cases.

66. Please explain whether and how the DOJ weighed the best interests of consumers when choosing to file a brief in *Stigar v. Dough Dough* (WA Eastern District).

Response:

In its Statement of Interest in *Stigar v. Dough Dough*, the Division focused on the applicable law rather than which parties benefit from a particular position the Department has taken.

67. Please explain the reasoning behind the DOJ's exercise of prosecutorial discretion to file a brief in *Stigar v. Dough Dough* (WA Eastern District), given the DOJ's wide focus and limited resources.

Response:

While the vast majority of the Division's resources are devoted to directly enforcing the antitrust laws, the amicus program is a valued complement to enforcement. Private litigation is an important aspect of the antitrust regime that Congress created, and in particular its treble damage provision provides an additional tool to deter anticompetitive acts. The Division's involvement in these cases, however, is important in providing guidance to the courts, to ensure they reach sound interpretations of the antitrust laws – which apply in both private and government cases – enabling effective and appropriate enforcement.

Making greater use of our amicus program also is good stewardship of our limited resources. For example, from start to finish, the Division's case against Atrium Health regarding anticompetitive steering restrictions cost over seven million dollars, approximately 100 times what the Division spent in connection with its statement of interest and motion to intervene in *Seaman v. Duke University*, litigation regarding no-poach agreements. Notably, both cases reached the same result from an enforcement perspective.

68. Please detail any meetings, phone calls, emails or interactions that you or others at the DOJ had with the International Franchise Association, the U.S. Chamber of Commerce or Littler Mendelson P.C. regarding *Stigar v. Dough Dough* (WA Eastern District).

Response:

Department policy limits my ability to comment on specific investigations or matters; however, in any matter, the Division often meets with a wide array of market participants and interested parties.

69. Please respond to the American Antitrust Institute's May 2, 2019 letter regarding your department's position in *Stigar v. Dough Dough* (WA Eastern District).

(https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w- Abstract.pdf)

Response:

I described the Division's position in *Stigar v. Dough Dough* above. The Division's position remains the same despite support or criticism from outside interest groups such as the American Antitrust Institute.

Questions from Rep. Scanlon

70. In addition to the examining how antitrust agencies might take enforcement actions to curtail abusive market practices by the large tech companies, I am interested in looking at how these same companies may be taking advantage of prior enforcement actions to unfairly benefit themselves under the auspices of the antitrust laws.

In 1941, ASCAP and BMI, two performance rights organizations representing songwriters for licensing public performances of musical works, entered into consent decrees with the Antitrust Division. These legacy decrees were necessary to protect traditional licensees - restaurants, bars, venues and a fledgling broadcast industry from anticompetitive behavior by the PROs. These protections were deemed necessary because individual licensees lacked market power and needed licenses to virtually all musical works in order to avoid significant liability for statutory damages under copyright law. When they were negotiated there was no imagining the giant tech companies of today.

Each of the largest tech companies possess significant market power as compared to songwriters/publishers and as compared to smaller radio stations and hospitality venues. This is a complex economic ecosystem that needs nuanced and comprehensive action to evaluate and modernize the decrees for a new era.

AAG Delrahim, if there are any discussions about the future of the consent decrees, will any next actions be thoughtful and comprehensive, and take into account the relative negotiating market power of songwriters/publishers, independent hospitality venues like restaurants and wineries, and large tech companies that could not have been imagined in 1941. How can we bring performance rights to a free and fair market given technological developments, while maintaining the efficiency of traditional/general licensing through ASCAP and BMI?

Response:

In June 2019, the Antitrust Division announced its intention to review the ASCAP and BMI decrees and opened up a public comment period. That comment period ended in August 2019. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-

2019. As the Division continues to review the comments, it continues to engage actively with parties and industry stakeholders. The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division intends to reach a conclusion about modifying, sunsetting, terminating, or keeping the decrees in place in the coming months.

November 13, 2019

Chairman Joseph J. Simons
Commissioner Rohit Chopra
Commissioner Noah Joshua Phillips
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons and Commissioners Chopra, Phillips, Slaughter and Wilson:

We write to urge the Federal Trade Commission to block Google's proposed acquisition of Fitbit. If this acquisition is approved, Google will further consolidate its monopoly power over Internet-based services. It will increase its already massive store of consumer data, including highly sensitive health and location information. Through its vast portfolio of internet services, Google knows more about us than any other company, and it should not be allowed to add yet another way to track our every move. This transaction should not be permitted because Google already holds a dominant position in the digital marketplace, health data is critical to the future of that marketplace, and the data protection concerns stemming from the acquisition will have far-reaching consequences including a dramatic erosion of consumer privacy.

This proposed acquisition should set off alarm bells at the FTC. It was, of course, Google that moved to consolidate user data across 60 different Internet-based services back in 2012,[1] over the objection of consumer groups, members of Congress, state attorneys general and even the Chairman of the FTC. And the outcome was predictable: competition diminished, innovation diminished, and data protection diminished.

Google's prior acquisition of Doubleclick also deserves close scrutiny before the FTC considers whether to allow this acquisition to go forward. In that case, Google failed to uphold representations that it made to the Commission regarding the personal data gathered by DoubleClick.[2] On that basis alone, the Commission should reject this proposal. Google has acquired more than 200 firms, many of which implicate personal privacy.[3] Those deals should also be reexamined.

Antitrust enforcers need to determine how the acquisition of Fitbit's data will strengthen Google's existing monopolies in search, advertising, and smartphone operating systems. It would be incorrect to define the relevant market as fitness wearables when examining anti-competitive effects of the acquisition. That analysis would miss relevant anti-competitive harms of the acquisition, a mistake made when assessing the Facebook/Instagram deal as well as the Amazon/Whole Foods deal. These regulatory reviews defined the relevant markets as photo-sharing applications and groceries. Enforcers cannot make the same mistake again by ignoring the consolidation this acquisition would cause within the health data marketplace. A review of contemporary business practices for the use of consumer data will reveal health information is broadly integrated into the range of products and services in which Google already dominates.

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[1] "Google Consolidates Privacy Policy; Will Combine User Data Across Services." January 24, 2012. <https://techcrunch.com/2012/01/24/google-consolidates-privacy-policy-will-combine-user-data-across-services/>
[2] "Google Consolidates Privacy Policy; Will Combine User Data Across Services." January 24, 2012. <https://techcrunch.com/2012/01/24/google-consolidates-privacy-policy-will-combine-user-data-across-services/>
ses/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>
[3] "List of mergers and acquisitions by Alphabet." <https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet>

Much like Google's Android acquisition allowed it to extend its desktop search monopoly to mobile devices, so too would an acquisition of Fitbit allow Google to extend its search monopoly to wearable devices. Google's goal is to be a ubiquitous gatekeeper that forecloses competitive threats to any of the markets it monopolizes. Google has eight business lines with over a billion users each[4], and this acquisition would fortify Google's monopoly power by dominating yet another portal to the consumer.

The commission's repeated failures to address both the antitrust and privacy dimensions of Google's ever-expanding hold over the digital marketplace has placed U.S.—and global—consumers and competitors at serious risk. It should not repeat this pattern of failure again.

The hubris of the executive team to pursue an acquisition of the size, a proposed $2.1 billion, while under federal and state antitrust investigations is astonishing. During their historic antitrust probes, Microsoft and IBM stopped such acquisition activity, which should indicate that we are now in an era of unprecedented disregard for legal authority. Google Senior Vice President, Rick Osterloh announced the agreement, saying it was an "opportunity to invest even more in Wear OS as well as introduce Made by Google wearable devices into the market."[5] These words should worry customers. Google has demonstrated its unwavering plan to acquire consumer data, regardless of its source, having recently been fined $170M for collecting children's personal data through its subsidiary YouTube.[6] Google should not gain control of Fitbit's sensitive and individualized health data that can be integrated with data from its current services to entrench its monopoly power.

If the acquisition is approved, a pending FDA stamp of approval for Fitbit would give Google even more influence in healthcare data and technology. Fitbit is already on track for FDA clearance,[7] as one of nine companies chosen to pilot the FDA's Software Precertification (Pre-Cert) Program. Pre-Cert would "provide more streamlined and efficient regulatory oversight of software-based medical devices developed by manufacturers who have demonstrated a robust culture of quality and organizational excellence." Based on the FDA overview, the pre-certified status would allow companies access to "participate in a streamlined premarket review and opportunities to collect and leverage real-world post-market data, which encourages innovation, timely patient access, and safety and effectiveness over the product life cycle."[8] A Gartner analyst and Senior Director, Alan Antin, noted the dangers of the acquisition in propelling Google into new industries. "This is really more like a long term play. Fitbit has, because of tens of millions of users, quite a database of health information. It instantly gets Google a big footprint."[9]

Despite Google's promise to be transparent about the data collected from Fitbit,[10] the latest reporting of Google's 'Project Nightingale,' which revealed the company's undisclosed partnership with one of the

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[4] "Google Drive will hit a billion users this week." July 25, 2018. <https://techcrunch.com/2018/07/25/google-drive-will-hit-a-billion-users-this-week/>

[5] "Helping more people with wearables: Google to acquire Fitbit." November 1, 2019. <https://www.blog.google/products/hardware/agreement-with-fitbit/>

[6] "YouTube fined $170m for collecting children's personal data." September 14, 2019. <https://www.theguardian.com/technology/2019/sep/04/youtube-kids-fine-personal-data-collection-children->

[7] "Fitbit Selected to Participate in FDA's New Digital Health Software Precertification Pilot Program." September 26, 2017. <https://investor.fitbit.com/press/press-releases/press-release-details/2017/Fitbit-Selected-to-Participate-in-FDAs-New-Digital-Health-Software-Precertification-Pilot-Program/default.aspx>

[8] "Digital Health Software Precertification (Pre-Cert) Program." July 18, 2019. <https://www.fda.gov/medical-devices/digital-health/digital-health-software-precertification-pre-cert-program>

[9] "A Google Fitbit means new possibilities and questions for the smartwatch." November 1, 2019. <https://www.cnet.com/news/a-google-fitbit-means-new-possibilities-and-questions-for-the-smartwatch/>

[10] "Google bought Fitbit. What does that mean for your data privacy?" November 1, 2019. <https://www.pbs.org/newshour/economy/making-sense/google-bought-fitbit-what-does-that-mean-for-your-data-privacy>

largest health care systems in the United States, Ascension, indicates a different practice of secrecy. The project gave Google access to millions of patients' medical records without the knowledge or consent of the patients or their doctors.[11]

Our antitrust laws were specifically enacted to prevent monopolies in their incipiency. The Celler-Kefauver Act authorized prohibitions against anti-competitive conglomerate mergers, such as Google-Fitbit. As the Supreme Court has stated that "Congress decided … not only to prohibit mergers between competitors, the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly' but to prohibit all mergers having that effect."[12]

We have the choice to accept a future where Google is at the center of all services, or directly regulate its monopoly power. Your job is to protect American consumers from such power, and we urge you to act.

Sincerely,

Sarah Miller
Senior Vice President,
Open Markets Institute

Josh Golin
Executive Director, Campaign for a
Commercial-Free Childhood

Jeffrey Chester
Executive Director, Center for Digital
Democracy

Susan Grant
Director of Consumer Protection and Privacy,
Consumer Federation of America

Robert Weissman
President, Public Citizen

James P. Massar
Oakland Privacy

Marc Rotenberg
President, EPIC

Tracy Rosenberg
Executive Director, Media Alliance

David Rosen
Communications Officer on Regulatory Affairs,
Public Citizen

Linda Sherry
Director of National Priorities, Consumer Action

[11] Google's 'Project Nightingale' Gathers Personal Health Data on Millions of Americans." November 11, 2019. <https://www.wsj.com/articles/google-s-secret-project-nightingale-gathers-personal-health-data-on-millions-of-americans-11573496790>

[12] U.S. Supreme Court United States v. Von's Grocery Co., 384 U.S. 270 (1966). <https://supreme.justia.com/cases/federal/us/384/270/>

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